No. 22696

In the

United States Court of Appeals

For the Ninth Circuit

SOUTHWEST FOREST INDUSTRIES, INC.,
Appellant,

vs.

WESTINGHOUSE ELECTRIC CORP.,
Appellee.

Opening Brief of Appellant Southwest Forest Industries, Inc.

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JURISDICTION

This action originated in the United States District Court for the District of Arizona on December 17, 1963, pursuant to 28 U.S.C.A. §1332 (TR 1-10).

The lower Court rendered an Opinion (TR 978-1007) and an Order and Judgment (Partial Summary Judgment) (TR 1008-1010), which were filed on September 8, 1967, in which the lower Court ordered that Appellee's Motion for Partial Summary Judgment as to all portions of Appellant's complaint, other than Count Three (anti-trust) be granted (TR 1011). The lower Court also expressly determined in its Order and Judgment (Partial Summary Judgment) that there was no just reason for delay and expressly directed the entry of final judgment in accordance with the lower

Court's Order and Judgment (Partial Summary Judgment) notwithstanding the fact that there remained other claims which had not been disposed of by the Court's Order and Judgment (TR 1011).

Appellant thereupon moved to Alter and Amend the Judgment on September 18, 1967 (TR 1013-1083) and said motion was denied by the Court on December 4, 1967. Appellant thereupon filed a Notice of Appeal on December 28, 1967 (TR 1193) and on the same date filed a bond for costs on appeal (TR 1194-1196). The jurisdiction of this Court rests on 28 U.S.C.A. §1291.

STATEMENT OF CASE

For the convenience of the Court, the individual parties will be referred to by their first names. The Appellant, Southwest Forest Industries, Inc., will be referred to as "Southwest", and the Appellee, Westinghouse Electric Corp., will be referred to as "Westinghouse."

In the late 1950's feasibility studies were conducted to determine whether or not it would be advisable for Southwest to build a pulp and paper mill to be located near Snowflake, Arizona. Assisting Southwest in portions of the feasibility studies was the Rust Engineering Company, a Delaware corporation, having its principal office in Pittsburgh, Pennsylvania (hereinafter called "Rust"). In order to have the necessary electrical power to run the Kraft and Newspaper Mill, it was determined that a 25,000 kw turbine generator unit was necessary.

On May 3, 1960, Rust sent an inquiry to Westinghouse addressed to the Westinghouse Electric Corp., Steam Division Sales Department (Exhibit CCC), wherein Rust requested that Westinghouse submit their proposal for furnishing one 25,000 kw turbine generator in accordance with certain specification. On page 3 of Exhibit CCC, Rust informed Westinghouse that:

> The proposed unit will be the sole source of electrical energy for a Kraft and Newsprint Paper Mill and shall therefore be of proven design and so constructed that long periods of trouble free operation can reasonably be expected.

On May 17, 1960, Southwest and Rust entered into an Engineering and Construction Contract (Ex. 1), wherein Southwest employed Rust, among other things, to install, erect and construct a pulp and paper mill and related facilities for the production of Kraft products.

On May 18, 1960, Westinghouse answered Rust's inquiry of May 3, 1960, by Exhibit DDD. In the cover letter accompanying the turbine-generator proposal, it was stated, by Mr. J. J. Sherman on behalf of Westinghouse:

> We are pleased to quote a price of $1,137,000.00 for the equipment covered in our proposal. *The equipment can be shipped from our factory in 15 months from the time a firm order with comlete information is received.* If this delivery does not line up with your requirements, we would appreciate the opportunity of negotiating with you in an effort to meet your needs. Deliveries on large items such as this can change rapidly because of the situation on large castings and forgings. Drawings for approval could be submitted in 90 days after receipt of an order. (Emphasis added)

In addition, the cover letter continued by stating:

> *In view of the fact that the proposed unit will be the only source of electrical power for the Kraft and Newsprint Mill, we direct your attention to several Westinghouse features that contribute to the high reliability of our unit. We urge that these features be considered in your evaluation.*
> (Emphasis added)

Near the bottom of the first page of the cover letter sent by Westinghouse to Rust, it stated in small, inconspicuous type: "Subject to the terms and conditions on the back of this quotation". On the reverse side of page one of the transmittal letter from Westinghouse to Rust, it is stated in part:

> WARRANTY—Westinghouse, in connection with the apparatus sold hereunder, agrees to correct any defect or defects in workmanship or material which may develop under proper or normal use during the period of one year from the date of shipment, by repair or by replacement f.o.b. factory of the

defective part or parts, and such correction shall constitute a fulfillment of all Westinghouse liabilities in respect to said apparatus, unless otherwise stated hereunder. Westinghouse shall not be liable for consequential damages.

ORDERS—On orders placed with Westinghouse in accordance with this quotation the above conditions shall take precedence over any printed conditions that may appear on your standard order form.

On June 6, 1960, the Rust Engineering Company by S. D. Clarke, Jr., Purchasing Agent, wrote a letter to the attention of Mr. J. J. Sherman of Westinghouse (Ex. EEE), wherein Mr. Clarke stated:

> It is the intention of Southwest Forest Industries, Inc., as soon as practicably possible, to issue a formal order to cover the purchase of one 25,000 kw turbine-generator unit. Generally in accordance with your above referenced proposal.
>
> *However, in the interim, please accept this letter of intent as your authorization to proceed establishing this date as the order date for determination of delivery for the turbine-generator, which we understand has been established for approximately 13½ months.* (Emphasis added)

Apparently, on June 13, 1960, Westinghouse sent to Rust an order acknowledgement form (see Ex. Y-1), which stated on the bottom: "See reverse side for terms and conditions" and on the reverse side thereof, the same statements with regard to the warranty provisions are stated as found in Exhibit DDD. However, it should be noted there are various notes contained on the order acknowledgement form for various people, of which Note One stated:

> Verbal order given to G Fortibi South Phila medium turbine sales of May 31, 1960 to proceed with outline data and loading information for customer with shipment required by July 15, 1961 or before.

Note Three stated:

> All necessary information must be available by July 7, 1960 for contract meeting with Rust Engr Co which will enable them to proceed with their engineering works.

However, it should be noted that there is no showing that Southwest received Exhibit Y-1 until March 29, 1962.

On June 14, 1960, Southwest specifically appointed James A. Stacey as its agent for the sole purpose of signing purchase orders to be issued in its name in connection with the construction of a pulp and paper mill and related facilities near Snowflake, Arizona (Exhibit KKK). The authority specifically granted by Southwest to James A. Stacey was to sign purchase orders issued pursuant to § "C" of Article I of an Engineering and Construction Contract between Southwest and Rust, dated May 17, 1960 (Pl. Ex. 1).

The next event to occur between the parties was on July 6, 1960, when Southwest accepted Westinghouse' offer to sell one 25,000 kw turbine generator by sending to Westinghouse a purchase order (Exhibit 2-A). On the front of Southwest's acceptance, it is stated near the top:

> This order is subject to the terms and conditions set forth on the reverse side hereof.

Near the bottom of the page, in bold type, it is stated:

IMPORTANT INSTRUCTIONS

Underneath the important instructions it is stated:

> Shipment and/or delivery by the Vendor of the materials covered hereby, with the consent of the Purchaser, shall in all cases constitute an unqualified acceptance of all the terms and conditions of this order by the vendor.

The reverse side of page 1 of Ex. 2-A states, in bold conspicuous type:

> THIS ORDER IS SUBJECT TO THE FOLLOWING TERMS AND CONDITIONS:
>
> . . .
>
> (2) The materials to be furnished hereunder shall comply with the plans and specifications furnished to the Vendor by the Purchaser or Engineer. The Vendor warrants the proper

quality, character, adequacy, suitability and workability of the materials. The Vendor and the materials furnished hereunder are subject to the approval of the Engineer. The Vendor agrees to indemnify the Purchaser and Engineer against all loss or damage arising from any defect in materials furnished hereunder.

. . .

(12) All negotiations and agreements prior to the date of this order are merged herein and superseded hereby, there being no agreements or understandings other than those written or specified herein. In the event of conflict between any proposal of Vendor specifically referred to herein and this order, and as to all matters or points not expressly covered by such proposal, the terms and conditions of this order shall govern.

On Exhibit 2-A, Mr. J. J. Rice of Westinghouse wrote in longhand:

Will ship w/o 7/10/61
J. J. Rice 8/9/60

and stamped the following:

ORDER PG 88081

In referring to this order please use this number as a reference.

Order accepted subject to conditions outlined in ~~attached~~ W. E. Corp. form of acknowledgement.

Mr. Rice crossed out the word "attached" and then did not transmit to either Southwest or Rust the "W. E. Corp. form of acknowledgement" (Appeal Transcript, p. 86).

On July 19, 1960, November 9, 1960, December 1, 1960, and January 20, 1961, Southwest revised its prior acceptance of the Westinghouse offer and in all cases Westinghouse stamped their acceptance thereon, and again crossed out the word "attached" in their acceptance stamp (Exhibit 2-A).

The erection for the turbine generator unit commenced on June 26, 1961, and the turbine itself arrived at the mill on August 21, 1961 (see answer to Interrogatory 1(a)(v)(ii) TR 368) and the installation of the turbine generator unit was completed on October 13, 1961. (See answer to Interrogatory 1(k) TR 373). On October 17, 1961, the turbine generator unit was first put into operation, but without the extraction stages (Appeal Transcript p. 110). On December 17, 1961, one extraction stage was put on the line and on December 22, 1961, both extraction stages were put on the line for the first time (Appeal Transcript, pp. 119-120).

From the very first day both extraction stages were put on the line, Southwest experienced a multitude of malfunctions with the turbine generator unit. On December 22, 1961, Southwest had extraction control difficulties with the turbine generator unit. Again, on December 23-24, 1961, the turbine generator unit malfunctioned in that the 60-pound grid valve froze and there was an oil leak. On December 27, 1961, Southwest again had problems with the malfunctioning turbine generator in that work on the governor extraction control was required. Again, on December 28-30, 1961, the turbine generator unit malfunctioned in that the 234-pound and 60-pound extractions were uncontrollable. On January 2, and January 3, 1962, there was a complete inspection and cleaning of the turbine generator unit. Again, on January 8-9, 1962, Southwest had difficulties with the turbine generator unit in that a new upset main spring had to be installed. Again, on January 22, 1962, the turbine generator unit malfunctioned, in that the 60-pound extraction safety disc ruptured. Again, on January 22-23, 1962, Southwest had difficulty with the malfunctioning turbine generator unit in that the 235-pound extraction safety disc ruptured. Again, on January 29, 1962, Southwest experienced difficulties with the malfunctioning turbine generator unit in that the 60-pound and 235-pound extraction piston cylinders were galled. Again, on January 31, 1962, Southwest experienced difficulties with the malfunctioning turbine generator unit in that the 235-pound Servo motors were cutting

out and surging. Again, on March 21, 1962, Southwest experienced difficulties with the malfunctioning turbine generator unit in that the extraction pistons were scored. Again, on March 26, 1962, and March 28, 1962, Southwest experienced difficulties with the malfunctioning turbine generator unit in that the 235-pound cylinder scored and piston galled. Again, on March 21, 1962, Southwest had difficulty with the malfunctioning turbine generator unit, in that the 235-pound and 60-pound extraction controls were operating improperly. On April 8-11, 1962, Southwest again had difficulty with the malfunctioning turbine generator unit, which required repair of regulator control block and governor sleeve. Again, on April 11, 1962, Southwest experienced difficulty with the malfunctioning turbine generator unit, which required the replacement of a ruptured disc on the 235-pound line. Again, on July 14, and July 18, 1964, Southwest experienced difficulty with the malfunctioning turbine generator unit, in that the exciter armature coil connection failed. Each of the foregoing mentioned dates the turbine generator unit was actually out of operation, thereby causing the pulp and paper mill of Southwest to be shut down. (See answer to Interrogatory No. 22, TR 63-64).

Southwest in its answers to Interrogatories, which have not been controverted, alleged that Westinghouse negligently manufactured the steam turbine generator unit in the following particulars: that mill cuttings and other foreign materials were not properly removed from the governor control hydraulic system prior to the shipment as a sealed unit from the factory; that mill cuttings and other foreign materials were not removed from the generator control unit system during the flushing procedure conducted by Westinghouse; that Westinghouse was negligent in design in that the governor control hydraulic system did not contain an adequate filtration method or device; that the ends of the armature coils were not properly soldered to the risers from the commutator bars, resulting in physical failure of two of these welded joints during July of 1964. (See answers to Interrogatories Nos. 26 and 27, TR 68; and supplemental answer to Interrogatory No. 27, TR 754).

Southwest has also alleged in its answers to Interrogatories, which have not been controverted by Westinghouse, that Westinghouse or its agents negligently made repairs and failed to remedy the defects in the turbine generator unit in the following respects: that they failed to determine the extent of damage in the governor control mechanism that had been caused by foreign material left in the hydraulic system in the Westinghouse factory; that they did not find and remove all of the foreign material after it was first discovered to be present in the hydraulic system by Westinghouse' service engineers; that by polishing out the score marks made on the power pistons and cylinder walls of the control system by the foreign materials, the result was excessive clearances and the consequent binding of the pistons in the cylinders during their normal action. (See answers to Interrogatory No. 25, TR 68.)

It was against this background that on December 17, 1963, Southwest sued Westinghouse alleging, in its final pleadings, in Count One, that Westinghouse negligently manufactured the turbine generator unit so that it failed to function and perform, and that as soon as Southwest informed Westinghouse to that effect, Westinghouse undertook to repair the turbine generator unit but that such repairs were negligently made and failed to remedy the defects caused by Appellee's negligence in the manufacture of the turbine generator unit. In Southwest's supplemental complaint it was alleged that Southwest discovered additional defects in the turbine generator unit and that such defects were in the exciter and were proximately caused by Westinghouse' negligence in the manufacture of the turbine generator unit, and that when Southwest notified Westinghouse of that fact, Westinghouse failed and refused to make the necessary repairs or to remedy such defects. Count Three of Southwest's complaint, which was severed by the lower Court, alleged a conspiracy in violation of Section One of the Sherman Act. In Count Four, Southwest alleged that certain warranties had been made by Westinghouse to Southwest and that they had been breached by Westinghouse.

SPECIFICATION OF ERRORS

1. The lower Court erred in its Order and Judgment (Partial Summary Judgment) of September 7, 1967 (TR 1008-1011) granting Appellee's Motion for Partial Summary Judgment on Count One of Appellant's complaint, because there were genuine issues as to material facts, and the Appellee was not entitled to a judgment as a matter of law.

2. The lower Court erred in its Order and Judgment (Partial Summary Judgment) of September 7, 1967 (TR 1008-1011) granting Appellee's Motion for Partial Summary Judgment on Appellant's supplemental complaint, because there were genuine issues as to material facts, and the Appellee was not entitled to a judgment as a matter of law.

3. The lower Court erred in its Order and Judgment (Partial Summary Judgment) of September 7, 1967 (TR 1008-1011) granting Appellee's Motion for Partial Summary Judgment on Count Two of Appellant's complaint, because there were genuine issues as to material facts, and the Appellee was not entitled to a judgment as a matter of law.

4. The lower Court erred in its Order and Judgment (Partial Summary Judgment) of September 7, 1967 (TR 1008-1011) granting Appellee's Motion for Partial Summary Judgment on Count Four of Appellant's complaint, because there were genuine issues as to material facts, and the Appellee was not entitled to a judgment as a matter of law.

5. The lower Court erred in its Order and Judgment (Partial Summary Judgment) of September 7, 1967 (TR 1008-1011) in its finding that the applicable warranty on the sale of the steam turbine generator unit was the exculpatory warranty of the Appellee.

6. The lower Court erred in its Order and Judgment (Partial Summary Judgment) of September 7, 1967 (TR 1008-1011) in finding that there was a meeting of the minds with regard to the warranty set forth in Specification No. 5.

7. The lower Court erred in its Order and Judgment (Partial Summary Judgment) of September 7, 1967 (TR 1008-1011) by finding that by virtue of the limitation in the warranty referred to in Specification No. 5, that the Appellee was not liable to Appellant for damages under any theory set forth in the final pleadings of the Appellant.

8. The lower Court erred in its Order and Judgment (Partial Summary Judgment) of September 7, 1967 (TR 1008-1011) in finding that there was no evidence before the Court that the Appellee had failed to perform its affirmative warranty duties of correction and replacement.

9. The lower Court erred in its Opinion of September 7, 1967 (TR 978-1007) in finding that there were no issues of material fact with respect to the matters before the Court for decision.

10. The lower Court erred in its Opinion of September 7, 1967 (TR 978-1007) in granting Appellee's Motion for Partial Summary Judgment as to the damages claimed under the theory of strict liability in tort, because the principles underlying the doctrine of strict liability in tort for defective products were not applicable.

11. The lower Court erred in its Opinion of September 7, 1967 (TR 978-1007) in finding that all damages sought by Appellant were consequential.

12. The lower Court erred in its Opinion of September 7, 1967 (TR 978-1007) in finding that the circumstances of the case at bar did not bring the Appellant within the class of consumers entitled to relief based upon strict liability in tort.

13. The lower Court erred in its Opinion of September 7, 1967 (TR 978-1007) in finding that neither the philosophy nor the theory of the doctrine of strict liability in tort, nor the actual holdings of cases involved support an extension of the doctrine of strict liability in tort to the present facts in determining that all of the parties operated on the assumption that the Appellee's proposal and the Rust Engineering Company letter of intent constituted the contract for sale of the turbine generator unit.

14. The lower Court erred in its Opinion of September 7, 1967 (TR 978-1007) in determining that the conduct of the parties could not be reasonably explained on any other basis.

15. The lower Court erred in its Opinion of September 7, 1967 (TR 978-1007) in determining that by every objective test there was an agreement as to the nature of the contract in effect and its terms and conditions and particularly as to the express warranty involved.

16. The lower Court erred in its Opinion of September 7, 1967 (TR 978-1007) in determining that the limitation of liability provisions in the Appellant's proposal and form of acknowledgement were sufficient under the *Uniform Commercial Code*, §2-719 to limit the Appellee's liability so as to exclude consequential damages based on breach of contract.

17. The lower Court erred in its Opinion of September 7, 1967 (TR 978-1007) in determining that there was no evidence before the Court that the Appellee failed to perform its obligations under its warranty.

18. The lower Court erred in its Opinion of September 7, 1967 (TR 978-1007) in determining that the limitations of liability under Pennsylvania law were valid and enforceable.

19. The lower Court erred in its Opinion of September 7, 1967 (TR 978-1007) in determining that the parties to an agreement may contract as to limitation of liability resulting from breach of both express and implied warranties.

20. The lower Court erred in its Opinion of September 7, 1967 (TR 978-1007) in finding that there had been no allegations of unconscionability.

21. The lower Court, in its Opinion of September 7, 1967 (TR 978-1007), in determining that although liability for consequential damages resulting from negligence was not expressly limited in Appellee's form of warranty, erred in finding that the provisions limiting liability to exclude consequential damages were sufficiently broad to limit liability resulting from negligence.

22. The lower Court erred in its Opinion of September 7, 1967 (TR 978-1007) in finding that under the facts in the case at bar there could be no recovery for consequential damages based upon a theory of tort, apart from a contractual duty.

23. The lower Court erred in its Opinion of September 7, 1967 (TR 978-1007) in determining that any remedy for breach of duty of repair under the warranty referred to in Specification No. 5 was similarly limited to repair and replacement of defective materials and workmanship for a period of one year.

24. The lower Court erred in its Opinion of September 7, 1967 (TR 978-1007) in determining that the documents constituting the contract between the Appellee and the Appellant with respect to the sale of the turbine generator unit were the proposal of the Appellee and the Rust Engineering Company letter of intent, as confirmed by the Appellee's form of acknowledgement.

25. The lower Court erred in its Opinion of September 7, 1967 (TR 978-1007) in determining that the effect of the documents referred to in Specification No. 24 and of the conduct of the parties with respect thereto was to include the Appellee's form of warranty and limitation of liability as part of the agreements of the parties.

26. The lower Court erred in its Opinion of September 7, 1967 (TR 978-1007) in determining that the terms of the Appellee's form of warranty and limitation of liability under Pennsylvania law were sufficient to limit Appellee's liabilities so as to exclude recovery of consequential damages resulting from breach of express or implied warranty or from negligence, in the manufacture, installation and repair of the turbine generator unit.

27. The lower Court erred in its Opinion of September 7, 1967 (TR 978-1007) in determining that there is no separate tort duty, apart from a duty based on contract, to compensate the Appellant for consequential losses which it claims to have suffered.

QUESTIONS PRESENTED FOR REVIEW

The questions involved in this appeal are as follows:

I. Can a court properly grant a motion for summary judgment to the moving party, when the moving party on a motion for summary judgment fails to establish that there are no genuine issues as to material facts?

II. Was there a meeting of the minds of Southwest and Westinghouse on all of the terms and conditions set forth in the Westinghouse offer and the Southwest acceptance?

III. When an unconscionable exculpatory clause, which was not brought to the attention of a party, fails in its essential purpose and operates to deprive the party of a substantial value of the bargain, is such an exculpatory clause unconscionable under the *Uniform Commercial Code?*

IV. When the record on appeal affirmatively shows that Westinghouse was negligent in the manufacture and repair of the steam turbine generator unit, then was it proper for the lower Court to grant Westinghouse' motion for summary judgment against Southwest on the theory of negligence, when Southwest had established a prima facie case in negligence?

V. Is the granting of a summary judgment proper when the moving party has not shown that it is entitled to a judgment as a matter of law?

VI. Did the lower Court improperly grant Westinghouse' motion for summary judgment based upon the theory of strict liability in tort, when all indications would show that the Supreme Court of the State of Arizona would grant recovery to Southwest in strict liability in tort in the case at bar?

VII. When a seller has not disclaimed express and implied warranties, can the seller effectively disclaim express and implied warranties given by merely restricting the damages and remedies of the buyer without complying with the precise requirements for disclaimer of express and implied warranties as provided for in the *Uniform Commercial Code?*

SUMMARY OF ARGUMENT

I. A motion for summary judgment cannot be granted when there are genuine issues as to material facts, and the moving party has the heavy burden of proof to show that there are no genuine issues as to any material fact. Even though counsel for the parties may stipulate that there exists no dispute as to any material fact, such a stipulation is obviously inoperative since the lower Court cannot be controlled by agreement of counsel on a question of law, and in fact, the lower Court has the affirmative duty to search the entire record to determine if there are genuine issues as to material facts. Not only must the historic facts be free from controversy, but also there must be no controversy as to the inferences which may be drawn from the historic facts, and when questions of fact are presented as to the nature of a person's conduct, intention, or state of mind, and it is very unusual that a disposition of the case may be made by summary judgment.

II. There was never a meeting of the minds of Southwest and Westinghouse on all the terms and conditions set forth in the Westinghouse offer and the Southwest acceptance. In such a case, when the minds of the contracting parties do not meet and assent to all of the essential terms and conditions contained in an offer and acceptance, then there is still a contract under §2-207(3) of the *Uniform Commercial Code,* when the conduct of the contracting parties recognizes the existence of a contract. The contract between the parties will then consist of those terms upon which the writings of the parties agree, together with any supplementary terms incorporated under the other provisions of the *Uniform Commercial Code.* When an unconscionable exculpatory clause, such as used by Westinghouse in the case at bar, is not brought to the attention of a contracting party, it does not become a part of the contract between the parties. Further, assuming arguendo that there was a meeting of the minds between Southwest and Westinghouse on all the essential terms and conditions contained in the offer by Westinghouse and the acceptance by Southwest, then in that case, the different terms contained in the Southwest

acceptance became a part of the contract between the parties by virtue of §2-207 of the *Uniform Commercial Code.*

III. When an unconscionable exculpatory clause, which was not brought to the attention of a party, fails in its essential purpose and operates to deprive the party of a substantial value of the bargain, then such an exculpatory clause is unconscionable under the *Uniform Commercial Code.* Even assuming, arguendo, that the Westinghouse unconscionable exculpatory clause applied, then the unconscionable exculpatory clause does not limit recovery by Southwest when Westinghouse repeatedly failed to adequately correct the defects as promised. Also, the purchase price paid by Southwest to Westinghouse for the steam turbine generator unit was excessively high as a result of a conspiracy by Westinghouse in violation of Section One of the Sherman Act, and as such, the contractual provisions as contended by Westinghouse are unconscionable.

IV. The record on appeal affirmatively shows that Westinghouse was negligent in the manufacture and repair of the steam turbine generator unit, and it was, therefore, improper for the lower Court to grant Westinghouse' motion for summary judgment against Southwest on the theory of negligence, when Southwest had established a prima facie case in negligence. Under the law of the State of Arizona, Southwest may recover against Westinghouse on the theory of negligence, because the liability for negligence may co-exist with a buyer's cause of action for breach of warranty.

V. The granting of a motion for summary judgment was improper because Westinghouse had not shown that it was entitled to a summary judgment as a matter of law. Even assuming, arguendo, that the Westinghouse unconscionable exculpatory clause applied to consequential damages, then Westinghouse, as the moving party, had not shown as a matter of law that Southwest is not entitled to recover incidental damages.

VI. The lower Court improperly granted Westinghouse' motion for summary judgment based upon the theory of strict liability

in tort, when all indications show that the Supreme Court of the State of Arizona would grant recovery to Southwest based upon a theory of strict liability in tort, since Arizona has adopted the Doctrine of Strict Liability in Tort.

VII. Westinghouse has not disclaimed certain express and implied warranties given to Southwest, and therefore, Westinghouse cannot effectively disclaim the express and implied warranties given to Southwest by merely restricting the damages and remedies of Southwest, without complying with the precise requirements for disclaimer of express and implied warranties as provided for in the *Uniform Commercial Code.* Even assuming arguendo, that the unconscionable exculpatory clause of Westinghouse applies, then Westinghouse has not disclaimed the express and implied warranties given to Southwest and Westinghouse should not be allowed to do so merely by using an inconspicuous unconscionable exculpatory clause limiting the remedies of Southwest.

QUESTION I AFFECTING SPECIFICATION OF ERROR 1, 2, 3, 4, 5, 6, 7, 8, 9, 12, 14, 15, 17, 20, 22, 23, 24 and 25.

ARGUMENT

I. Can a Court Properly Grant a Motion for Summary Judgment to the Moving Party, When the Moving Party on a Motion for Summary Judgment Fails to Establish That There Are No Genuine Issues as to Material Facts?

A. AN AGREEMENT BY COUNSEL THAT THERE EXISTS NO GENUINE ISSUE TO ANY MATERIAL FACTS IS INOPERATIVE, AND THE COURT CANNOT BASE THE GRANTING OF A MOTION FOR SUMMARY JUDGMENT ON SUCH AN AGREEMENT, BECAUSE THE LOWER COURT CANNOT BE CONTROLLED BY AGREEMENTS OF COUNSEL ON QUESTIONS OF LAW.

As this Court knows, the requirements for the granting of a summary judgment are set forth in Rule 56 of the Federal Rules of Civil Procedure. Rule 56(c) provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavit, if any, *show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.* (Emphasis added)

In the case at bar, the lower Court in its Opinion (TR 979, 984) and in its Order and Judgment (TR 1009) relied upon an agreement between counsel for Southwest Forest Industries and Westinghouse that there was no dispute as to any material issue of fact, and therefore, there being by agreement of counsel no genuine issue as to any material fact, the lower Court entered its order granting Westinghouse' motion for partial summary judgment (TR 984).

The agreement that the lower Court referred to, occurred on August 11, 1967, and stated as follows:

> The Court: And the parties agree that there exists no dispute as to any material fact necessary to decide the legal issues of what constitutes the contract warranty and whether the defendant is liable thereunder for the claimed consequential damages; is that correct?
>
> Mr. Perry: That is correct.
>
> (Appeal Transcript, pp. 229-230)

At first blush, it might appear that this agreement eliminated any material issue of fact to be presented to the tryer of fact. However, reference should be made to the proceedings held before the Court prior to the submission of the motion for summary judgment by Westinghouse. On August 10, 1967, Mr. Perry stated to the Court as follows:

> Counsel has raised the point in two separate motions for summary judgment that consequential damages cannot be recovered in this action, in an action based upon negligence, for the reason that he takes the position that consequential damages are never recoverable in a negligence action; and for the second reason *that he believes the warranty clause, which is the effective clause in this case, has the effect of barring a right to recover in tort. We, of course, resist both of those positions.*
>
> (Appeal Transcript, p. 223) (Emphasis added)

In the case of *Swift & Co. v. Hocking Valley R. Co.*, 243 U. S. 281, 289; 61 L.Ed. 722, 725-26 (1917), the Supreme Court of the United States was dealing with the question of a stipulation by

the parties and the effect of such stipulation upon the court. With regard to the effect of a stipulation, the Supreme Court of the United States stated:

> *If the stipulation is to be treated as an agreement concerning the legal effect of admitted facts, it is obviously inoperative; since the court cannot be controlled by agreement of counsel on a subsidiary question of law.* If the stipulation is to be treated as an attempt to agree 'for the purpose only of reviewing the judgment' below, that what are the facts shall be assumed not to be facts, a moot or fictitious case is presented. '*The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it . . . No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty of the court in this regard*' . . . we treat the stipulation, therefore, as a nullity. (Citations omitted) (Emphasis added)

In the case of *Cram v. Sun Insurance Office, Ltd.*, 375 F.2d 670 (4th Cir. 1967), the trial court was faced with a similar problem as in the case at bar, and the court stated as follows:

> *The summary judgment procedure is available only in cases where there is no genuine issue of material fact. Whether or not a genuine issue of material fact exists is a determination for the court, not the parties, and the fact that the parties may have thought there was no material fact in issue is in no way controlling.* 'The fact that both sides moved for summary judgment does not establish that there is no issue of fact and require that judgment be granted for one side or the other.' Neither party, by moving for summary judgment, concedes the truth of the allegations of his adversary other than for purposes of his own motion. A movant may contend that under his theory of the case, no substantial issue of fact exists, while under the adversary's theory factual questions are in issue . . . *Moreover, the party opposing a motion for summary judgment is entitled to all favorable inferences which can be drawn from the evidence.* (Citations omitted) (Emphasis added) (375 F.2d at 673-674)

The trial Court in the *Cram* case relied on depositions which were apparently uncontroverted by counsel; however, the Court of Appeals stated:

> However, it does not necessarily follow that the case can therefore be disposed of by summary judgment. (375 F.2d at 674)

The Court then held:

> *'Not merely must the historic facts be free of controversy but also there must be no controversy as to the inferences to be drawn from them. It is often the case that although the basic facts are not in dispute, the parties nevertheless disagree as to the inferences which may properly be drawn. Under such circumstances the case is not one to be decided on a motion for summary judgment.'*
> (Emphasis added) (Citations omitted) (375 F.2d at 674)

Another case which follows the reasoning in the *Cram* case is that of *Brawner v. Pearl Assurance Company,* 267 F.2d 45 (9th Cir. 1958) wherein the Court stated:

> (1) In this case, this Court is again confronted with the confusion which follows the filing of motions for summary judgment by plaintiff and defendant, respectively. Again it is reiterated that such a situation does not parallel that where both parties file motions for directed verdict. In the latter instance, each party is held to agree that there is no disputed question of fact and that the case is to be decided on the principles of law. *In contrast, by definition, a summary judgment cannot be granted if there be a disputed question of material fact. This determination does not depend upon what either or both parties may have thought about the matter.*
> (Emphasis added) (267 F.2d at 46)

It should also be noted that in the *Brawner* case, *supra,* the United States Court of Appeals for the 9th Circuit held that a motion for summary judgment would not lie unless the defendant could establish by uncontroverted facts that plaintiff suffered no loss whatsoever and that whether plaintiff suffered loss and in what amount constituted a genuine issue of a material fact.

Therefore, it is respectfully submitted that the agreement of counsel that there existed no dispute as to any material fact is inoperative, and as such, the Court cannot base the granting of a motion for summary judgment on such agreement because the Court has the affirmative duty to search the pleadings, depositions, and answers to interrogatories, in order to make a judicial determination that there exists, as a matter of law, no genuine issue as to any material fact before the Court can grant a motion for summary judgment.

B. IN DETERMINING WHETHER OR NOT THERE ARE GENUINE ISSUES AS TO MATERIAL FACTS, NOT ONLY MUST THE HISTORIC FACTS BE FREE FROM CONTROVERSY, BUT THERE MUST ALSO BE NO CONTROVERSY AS TO THE INFERENCES WHICH MAY BE DRAWN FROM THE HISTORIC FACTS, AND THE NON-MOVING PARTY IS ENTITLED TO ALL FAVORABLE INFERENCES WHICH CAN BE DRAWN FROM THE HISTORIC FACTS AND ALL DOUBTS AS TO THE EXISTENCE OF A GENUINE ISSUE AS TO A MATERIAL FACT MUST BE RESOLVED AGAINST THE PARTY MOVING FOR A SUMMARY JUDGMENT.

Even though there is no dispute as to the existence of a contract between Westinghouse and Southwest, and even though there may be no dispute as to the historic facts which comprise the various documents which comprise the contract, there are material issues of fact as to the inferences which may be drawn from the various documents in the case at bar.

In the case of *American Fidelity & Cas. Co. v. London & Edinburgh Ins. Co.*, 354 F.2d 214 (4th Cir. 1965), the Court stated:

> The fact that both sides move for summary judgment does not establish that there is no issue of fact and require that judgment be granted for one side or the other. A party may concede that there is no issue if his legal theory is accepted and yet maintain that there is a genuine dispute as to material facts if his opponent's theory is adopted... In order to grant a motion for summary judgment it must be shown 'that there is no genuine issue as to any material fact.' ... *Not merely must the historic facts be free of controversy, but also there must be no controversy as to the inferences which may be drawn from them. It is often the case that although the basic facts are not in dispute, the parties nevertheless disagree as to the inferences which may properly be drawn. Under*

such circumstances the case is not one to be decided on a motion for summary judgment. (Emphasis added) (354 F.2d at 216)

In the case at bar, even though we do not have cross motions for summary judgment, it is readily apparent that we have an analogous situation, especially in the light of the arguments advanced by counsel for Southwest and Westinghouse and the various inferences which they attached and argued with reference to the documents in an attempt to show the existence or non-existence of the specific contract between the parties. Even though the parties may have agreed that the historic facts were free of controversy, their argument to the Court conclusively shows that there was a controversy as to the inferences which could be drawn from the historic facts and documents before the Court. For arguments of counsel on the historic documents and the inferences that they draw from them see arguments of counsel set forth in Appendix II.

The Federal Courts have consistently held that questions of fact are presented as to the nature of a person's conduct and intention and that *"sound judicial administration strongly suggests that a Court should not attempt to reconstruct the intent of the parties in a complicated fact situation before they have had an opportunity to present evidence on that issue before the fact-tryer",* (emphasis added) and that under such circumstances, the facts should be fully explored at a trial precluding summary judgment. See *Rosenfeld v. Schwitzer Corporation,* 251 F.Supp. 758, 763 (S.D.N.Y. 1966).

The case of *Consolidated Electric Co. v. United States,* 355 F.2d 437 (9th Cir. 1966) was an action brought under the Miller Act to recover on behalf of the subcontractor's supplier against the subcontractor, prime contractor, and prime contractor's surety. The Court of Appeals reversed the District Court's granting of summary judgment against defendants, holding that certain fact issues existed such as to preclude summary judgment. There is an interesting statement concerning summary judgment contained in

this case, which does an excellent job of summing up Southwest's position in the case at bar:

> Summary judgment has been described as a 'drastic remedy' . . . It should be rendered, upon motion, only 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' . . . *If, viewing the evidence as a whole and the inferences which may be drawn therefrom in the light most favorable to the party opposing the motion, we can see that there is no genuine issue of fact, then the granting of a motion for summary judgment should be sustained. When an issue requires determination of state of mind, it is unusual that disposition may be made by summary judgment.* . . . It is important and ordinarily essential, that the trier of fact be afforded the opportunity to observe the demeanor, during direct and cross-examination, of a witness whose subjective motive is at issue.
> (Citations omitted) (Emphasis added) (355 F.2d at 438-439)

The Court found to exist certain issues of material fact in the form of possible inferences which could be drawn from the evidentiary facts, and stated in this regard:

> Under the peculiar circumstances, we believe that the trial court may have derived aid from observation of the demeanor and attitude of witnesses, particularly under cross-examination. As our court has written,
>
> > 'If the district court were permitted to weigh the evidence and resolve issues in making its findings of fact and conclusions of law, we could properly find from the evidence here that the findings and conclusions should be sustained. It is necessary to determine, however, whether viewing the evidence as a whole and the inferences to be drawn therefrom in the light most favorable to the (party opposing the motion for summary judgment) it may be said that there is no genuine issue of fact[11] mindful also of the fact that there is no express finding to that effect by the district court (as there was no such express finding by the trial court in the case at

bar)' United States ex rel. Austin v. Western Elec. Co., supra, 337 F.2d, at 572.

(11) *An issue of fact may arise from inferences to be drawn from all evidence, and all doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for a summary judgment* ... (Citation omitted) (Emphasis added) (355 F.2d at 440)

The case of *United States v. Western Electric Co.*, 337 F.2d 568 (9th Cir. 1964) involved an action by a subcontractor and his surety under the Miller Act against a prime contractor. The District Court entered summary judgment for defendants, from which plaintiffs appealed. The United States Court of Appeals for the Ninth Circuit held that the pleadings, affidavits, and answers to interrogatories presented genuine issues of fact as to whether, for purposes of the right of defendants to invoke the Statute of Limitations, any work had been performed on or after a certain date. Here, the District Court weighed the evidence rather than determining whether a genuine issue of material fact existed. This case stands for the proposition that when a motion for summary judgment is filed, the Court is to determine whether a genuine issue of material fact exists, and is not to substitute itself as the trier of fact as it might where fact isues are actually tried to the Court instead of a jury. The Opinion states:

> The findings of fact recite that 'having considered all of the evidence and having examined all of the proofs offered by the respective parties' the court makes its findings of fact —a form customarily followed where the court has weighed the evidence and resolved the issues. Rule 52(a), by amendment effective March 19, 1948, specifically provides that, 'Findings of fact and conclusions of law are unnecessary on decisions of motions' for summary judgment under Rule 56. We recognize, however, that findings of fact and conclusions of law are frequently used in granting motions for summary judgment. ... findings of fact, 'while unnecessary,' sometimes 'provide a handy summary.' On the other hand, 'all too often a set of unnecessary findings of fact is the telltale flag that points the way to a discovery that summary judgment should not have been granted.'

> If the district court were permitted to weigh the evidence and resolve issues in making its findings of fact and conclusions of law, we could properly find from the evidence here that the findings and conclusions should be sustained. It is necessary to determine, however, whether viewing the evidence as a whole and the inferences to be drawn therefrom in the light most favorable to the plaintiff it may be said that there is no genuine issue of fact, mindful also of the fact that there is no express finding to that effect, by the district court. (Citation omitted) (337 F.2d at 572)

Therefore, it is respectfully submitted that in the case at bar, even though the historic facts may be free from controversy, the record, as shown by arguments of counsel, affirmatively shows that there is a substantial controversy as to the inferences which are drawn from the historic facts, and since the non-moving party is entitled to all favorable inferences which can be drawn from the historic facts, and since all doubt as to the existence of a genuine issue as to a material fact must be resolved against the party moving for a summary judgment, it is submitted that the lower Court improperly granted the Appellee's motion for summary judgment.

In conclusion, it is submitted that a motion for summary judgment cannot be granted when there are genuine issues as to material facts, and the moving party has the heavy burden of proving that there are no genuine issues as to material facts. In the case at bar, even though counsel may have stipulated that there existed no dispute as to any material fact, such a stipulation was obviously inoperative since the trial Court cannot be controlled by agreement of counsel on a subsidiary question of law, and in fact, the trial Court has the affirmative duty to search the entire record to determine if there are genuine issues as to material facts. In determining whether or not a summary judgment should lie, not only must the historic facts be free from controversy, but also there must be no controversy as to the inferences which may be drawn from the historic facts and questions of fact were presented in the case at bar because there was a genuine dispute as to the inferences which were drawn from historic facts so as to preclude the granting of a

motion for summary judgment. Also, questions of fact are presented when the determination of the nature of a party's conduct, its intent, or state of mind was taken into consideration by the trial Court.

Therefore, it is respectfully submitted that the trial Court's granting of the Appellee's motion for partial summary judgment was improper and should be reversed by this Court.

QUESTION II AFFECTING SPECIFICATION OF ERROR 1, 2, 3, 4, 5, 6, 7, 8, 9, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, and 27.

ARGUMENT

II. Was There a Meeting of the Minds of Southwest and Westinghouse on All of the Terms and Conditions Set Forth in the Westinghouse Offer and the Southwest Acceptance?

A. WHEN THE MINDS OF THE CONTRACTING PARTIES DID NOT MEET AND ASSENT TO ALL OF THE ESSENTIAL TERMS AND CONDITIONS CONTAINED IN AN OFFER AND AN ACCEPTANCE, THERE IS STILL A CONTRACT UNDER §2-207(3) OF THE UNIFORM COMMERCIAL CODE WHEN THE CONDUCT OF THE CONTRACTING PARTIES RECOGNIZES THE EXISTENCE OF A CONTRACT.

On May 18, 1960, Westinghouse sent to Rust Engineering Company a letter offering to sell to Southwest a 25,000 kw turbine generator unit at a price of $1,137,000.00 (Ex. DDD). On the front page of Exhibit DDD, Westinghouse expresses the virtues of the high reliability of their steam turbine generator unit by stating:

> In view of the fact that the proposed unit will be the only source of electrical power for the Kraft and Newsprint Mill, *we direct your attention to several Westinghouse features that contribute to the high reliability of our unit.* We urge these features be considered in your evaluation. (Emphasis added)

However, what Westinghouse giveth it also taketh away, for on the back page of Exhibit DDD in inconspicuously small type, Westinghouse set forth certain statements, among which are the following:

> WARRANTY—Westinghouse, in connection with apparatus sold hereunder, agrees to correct any defect or defects

in workmanship or material which may develop under proper or normal use during the period of one year from the date of shipment, by repair or by replacement f.o.b. factory of the defective part or parts, and such correction shall constitute a fulfillment of all Westinghouse liabilities in respect to said apparatus, unless otherwise stated hereunder. Westinghouse shall not be liable for consequential damages.

* * *

ORDERS—On orders placed with Westinghouse in accordance with this quotation the above conditions shall take precedence over any printed conditions that may appear on your standard order form.

On July 6, 1960, Southwest, by its purchase order (Ex. 2-A) accepted Westinghouse' offer to sell a 25,000 kw turbine generator unit.

On the face of Southwest's purchase order (Ex. 2-A) it is stated in bold type:

IMPORTANT INSTRUCTIONS

Directly underneath the words "Important Instructions" it is stated:

Shipment and/or delivery by the Vendor of the materials covered hereby, with the consent of the Purchaser, shall in all cases constitute an unqualified acceptance of all of the terms and conditions of this order by the vendor.

On the reverse side of the Southwest purchase order, it is stated in bold, conspicuous type:

THIS ORDER IS SUBJECT TO THE FOLLOWING TERMS AND CONDITIONS:

Following this, there are twelve important terms and conditions, of which we are concerned with Nos. 2 and 12. Sub-paragraph 2 states as follows:

(2) The materials to be furnished hereunder shall comply with the plans and specifications furnished to the Vendor

by the Purchaser or Engineer. The Vendor warrants the proper quality, character, adequacy, suitability and workability of the materials. The Vendor and the materials furnished hereunder are subject to the approval of the Engineer. *The Vendor agrees to indemnify the Purchaser and Engineer against all loss or damage arising from any defect in materials furnished hereunder.*
(Emphasis added)

Sub-paragraph 12 of the terms and conditions states:

(12) All negotiations and agreements prior to the date of this order are merged herein and superseded hereby, there being no agreements or understandings other than those written or specified herein. *In the event of conflict between any proposal of Vendor specifically referred to herein and this order, and as to all matters or points not expressly covered by such proposal, the terms and conditions of this order shall govern.*
(Emphasis added)

Southwest's original purchase order was accepted by Westinghouse by Mr. J. J. Rice. He then placed upon the purchase order the following notation:

In referring to this order please use this number as a reference.

Order accepted subject to conditions outlined in ~~attached~~ W. E. Corp. form of acknowledgement.

Mr. Rice crossed out the word "attached" and then did not transmit to either Southwest or Rust the W. E. Corp. form of acknowledgement. (See deposition of John J. Rice). Thereupon, subsequent to July 6, 1960, Westinghouse shipped to Southwest the steam turbine generator pursuant to the Southwest purchase order. It should be noted that subsequent purchase orders were sent by Southwest to Westinghouse on July 19, 1960, November 9, 1960, December 1, 1960, and January 20, 1961, on the same purchase order form all of which were accepted by Westinghouse.

In the case at bar, it is readily apparent, and we are sure that Westinghouse must admit, that a contract was in existence between the parties.

Therefore, it is readily apparent that the question is, upon which claimed terms and conditions of the documents did the minds of the parties meet? Did they meet on the terms and conditions found in the Southwest purchase order, or did they meet on the terms and conditions of Westinghouse' form of offer? What is the fact?

In the case of *Euclid Engineering Corporation v. Illinois Power Company,* 78 Ill.App.2d 235, 223 N.E.2d 409 (1967) the Court held that §2-204 of the *UCC* still required an agreement or meeting of the minds between the negotiating parties, and with respect thereto, the Court stated at p. 413:

> The law is well settled that in order for a contract to come into being, there must be a meeting of minds of the parties to the contract. ... We believe the rule to be well stated in I.L.P., Vol. 12, Contracts, §31, as follows:
>
> > One of the essential elements for the formation of a contract, other than a contract implied in law or quasi contract, is a manifestation of assent by the parties to the terms thereof. It is essential that both parties assent to the same thing in the same sense and that their minds meet on the essential terms and conditions.
>
> The Uniform Commercial Code has not made any change in the basic law. (Citations omitted)

It is apparent in the case at bar that the minds of the parties did not meet on all of the essential terms and conditions set forth in their respective documents. In such a case as this, the authors of the *Uniform Commercial Code* had great foresight, and the *UCC* steps in over the common law to fill this void by declaring that there is still a contract between the parties.

In §2-207, subsection (3) of the *UCC,* it is stated:

> (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. *In such case the terms of the particular contract consist of those terms on which the writings of the par-*

ties agree, together with any supplementary terms incorporated under any other provisions of this Act.
(Emphasis added)

In the case at bar, there can be no argument by either Southwest or Westinghouse that the conduct by both parties recognized the existence of a contract, because in fact, the steam turbine generator unit was actually delivered by Westinghouse to Southwest and Southwest paid the entire purchase price for the unit, except for the sum of $57,082.20 which, according to Westinghouse, is still owed by Southwest, as alleged in the counterclaim of the Appellee.

However, it is respectfully submitted that the minds of the parties in the case at bar did not meet and assent to all of the essential terms contained in the purchase order of Southwest and the offer of Westinghouse. In such a case as this, it is respectfully submitted that the operation of Subsection (3) of §2-207 is intended to apply, and in this event the conflicting terms and conditions in the documents upon which the minds of the parties did not agree are excluded and the contract between the parties becomes only those portions of the terms and conditions upon which the writings of the parties agree and any supplemental terms incorporated under any other provisions of the *UCC*.

B. AN UNCONSCIONABLE EXCULPATORY CLAUSE, WHICH IS NOT BROUGHT TO THE ATTENTION OF A CONTRACTING PARTY, DOES NOT BECOME A PART OF THE CONTRACT BETWEEN THE PARTIES.

The courts have consistently held that an unconscionable exculpatory clause, such as used by Westinghouse in the case at bar, must be brought to the attention of the parties. In 3 Bender's *UCC Service*, Section 4.08(2), p. 4-102, the authors state:

> Another area where courts have been active to construe provisions strictly against their authors, or where the harshness of the results has been an object of judicial avoidance is that of clauses limiting the remedy which either party, but usually the buyer, may have. The most commonplace is the clause limiting an injured buyer to a repair or replacement of

> defective parts. After several fruitless attempts at repair, resort to legal sanction may be necessary. *Courts have stated that such terms did not become a part of the bargain because not brought to the attention of the parties, or that failure to repair meant that the remedy was not effective and therefore allowed the injured party to assert any other remedy available at law.* Section 2-719(2) now provides that where resort to a remedy set forth in the agreement fails of its essential purpose, the party shall have any remedy provided under the Code. (Emphasis added)

In the case at bar, not only has the remedy of repair failed in its essential purpose, but in addition thereto, notice of the exculpatory clause was not brought home to Southwest.

In the deposition of John J. Rice, Project Correspondent for Westinghouse, dated August 5, 1967, the following questions were asked and answered on p. 15 and p. 16:

> Q. Did you ever discuss with Mr. Fritschi the terms and conditions of warranty?
>
> A. No, sir.
>
> Q. *Did you ever discuss with anyone from Rust Engineering, or from Southwest Forest Industries, the terms and conditions of warranty?*
>
> A. *No, sir.* (Emphasis added)

At the deposition of John J. Sherman, Sales Engineer for Westinghouse, on August 4, 1967, the following questions were asked and answered on pp. 8 and 9:

> Q. At any time from the time you made your proposal in writing to Rust and up until the time the letter of intention was received by Westinghouse, did you have any discussions with Rust personnel which were directed to the terms and conditions of any warranties to accompany the sale?
>
> A. Other than the terms and conditions?
>
> MR. FLYNN: If you remember.
>
> A. I was going to say the only thing that I could even tell you that I remember is the terms and conditions as outlined in a quotational letter on the back of the Westinghouse standard form, the only thing I have any reference to whatso-

ever, and only because that is standard. We did not discuss it in detail at all.

Q. *Did you at any time ever discuss in detail and with any degree of specificity the terms and conditions of any warranties in the sale of this turbine generator with Rust people?*

A. *None that I can remember.*

Q. *Did you ever have any discussion with any person from Southwest Forest Industries about the terms and conditions of warranties?*

A. To my knowledge, I never had any discussion with Southwest Forest Industries personnel directly.

(Emphasis added)

For cases allowing recovery even though repair and replacement was set forth as the exclusive remedy available, see *Jarnot v. Ford Motor Co.,* 191 Pa. 422, 156 A.2d 568 (1959); *Seely v. White Motor Co.,* 63 Cal.2d 9, 403 P.2d 145 (1965).

Therefore, it is respectfully submitted that since the unconscionable exculpatory clause contained in the Westinghouse offer was not brought to the attention, as required by the *Uniform Commercial Code,* of Southwest or Rust, then in that case, the terms of the unconscionable exculpatory clause did not become a part of the contract, and as such, Southwest is entitled to assert against Westinghouse any other remedy available at law.

C. ASSUMING, ARGUENDO, THAT THERE WAS A MEETING OF THE MINDS BY SOUTHWEST AND WESTINGHOUSE ON ALL OF THE ESSENTIAL TERMS AND CONDITIONS CONTAINED IN THE OFFER BY WESTINGHOUSE AND THE ACCEPTANCE BY SOUTHWEST, THEN IN THAT CASE, THE DIFFERENT TERMS CONTAINED IN THE SOUTHWEST ACCEPTANCE BECAME PART OF THE CONTRACT BETWEEN THE PARTIES.

The *Uniform Commercial Code,* Article II §2-207 brings about a substantial change in the contract law of any state in which the Code has been adopted, as it has in Pennsylvania. Under pre-Code law, a responsive document which differed from or added to the terms of an offer in general could not be an acceptance prior to the adoption of the *UCC.* However, since the adoption of §2-207 of the *UCC,* an acceptance of an offer is effective even though it states *different terms* than the original offer. At this time we feel

it is important to set forth §2-207 of the *UCC* in its entirety for analysis by the Court. Section 2-207 states:

> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states *terms additional to* or *different from* those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
>
> (2) The *additional terms* are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
>
> (a) the offer expressly limits acceptance to the terms of the offer;
>
> (b) they materially alter it; or
>
> (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
>
> (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act. (Emphasis added)

The authors of the *Uniform Commercial Code,* in their precise and deliberate wording of §2-207 make an important distinction between *"different terms"* and *"additional terms"*. This is seen in Sub-section (1) of §2-207 wherein it is provided that an acceptance is effective even though it may state terms additional to *". . . or different from . . ."* those agreed upon. However, in Subsection (2) of §2-207, the authors limit the inclusion of "additional terms" by setting forth certain criteria which must be met before they shall be included in the contract between the parties.

This distinction is noted by Mr. Duesenberg and Prof. King in 3 Bender's *Uniform Commercial Code Service* §3.03(1), p. 3-28,

wherein they discuss and define "different" and "additional" terms, stating:

> The distinction between additional and different, as can be seen from the preceding illustration, would be crucial to the disposition of the case. Almost any situation where both parties have clauses addressed to a given subject area, but where they are different, is ripe for the type conflict these two terms of Section 2-207 suggest. *To avoid the section's getting bogged down in considerable wasteful litigation, and in view of the history of the section's drafting, wherever parties have covered the same provision, though in different language, the conflicting terms should be regarded as different, not additional.* Otherwise, it would seem that the impact of Subsection (2) with regard to 'additional', and indeed, the objective of the section to visit the consequences of an ambiguity on the party inserting it—the offeree—will be frustrated. Such a construction would also serve to minimize the objection to the section that it takes from an offeror the ability to retain control over the terms of his offer. (Emphasis added)

In the case at bar, the warranties and the obligation for breach thereof, are at odds because one of the Southwest warranties provides that the vendor warrants the proper quality, character, adequacy, suitability and workmanship of the materials, and that Westinghouse shall indemnify Southwest against all loss or damage arising from any defect in the materials furnished by Westinghouse. Whereas, the Westinghouse warranty and obligation therefrom provides that Westinghouse shall correct any defect or defects in workmanship or material which may develop during the period of one year by replacement or repair and that such correction shall constitute a fulfillment of all Westinghouse liabilities and further, that Westinghouse shall not be liable for consequential damages.

This construction is also consistent with the very terms of the Southwest purchase order, since Southwest informed Westinghouse that any shipment and/or delivery of the steam turbine generator unit by them constituted an unqualified acceptance of all of the terms and conditions of the Southwest purchase order.

Therefore, it is respectfully submitted that since both documents, by their terms, are talking of and discussing the same provision, although in different language, then the conflicting terms are "different" and not "additional" terms; and, therefore, the different terms contained in the Southwest purchase order become, pursuant to §2-207(1) of the *UCC,* part of the contract between the parties, thereby eliminating the warranty and liability for breach of warranty provided in the Westinghouse terms and conditions.

In conclusion, it is submitted there was never an assent or a meeting of the minds of Southwest and Westinghouse on all the essential terms and conditions contained in the offer and acceptance, and therefore, since the conduct by the parties themselves recognized the existence of a contract, then there was a contract under the *Uniform Commercial Code.* However, such a contract would only consist of the terms and conditions on which the documents of the parties agree, together with any supplemental terms incorporated under any other provisions of the *Uniform Commercial Code.* It is further submitted that since Westinghouse never discussed with Southwest or Rust the terms and conditions of their unconscionable exculpatory clause, that such unconscionable exculpatory clause did not become a part of the contract because it was not brought to the attention of Southwest or Rust. It is further submitted that, assuming arguendo that there was a meeting of the minds between Southwest and Westinghouse on all of the essential terms and conditions contained in the offer of Westinghouse and the acceptance by Southwest, then the different terms contained in the Southwest acceptance became a part of the contract between the parties, so as to allow Southwest to recover from Westinghouse any and all damages, including consequential damages, which arose by virtue of the breach of the express and implied warranties by Westinghouse.

QUESTION III AFFECTING SPECIFICATION OF ERROR 1, 2, 3, 4, 5, 6, 7, 8, 9, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, and 27.

ARGUMENT

III. When an Unconscionable Exculpatory Clause, Which Was Not Brought to the Attention of a Party, Fails in Its Essential Purpose and Operates to Deprive the Party of a Substantial Value of the Bargain, Is Such an Exculpatory Clause Unconscionable Under the Uniform Commercial Code?

A. EVEN ASSUMING, ARGUENDO, THAT THE WESTINGHOUSE UNCONSCIONABLE EXCULPATORY CLAUSE APPLIES, THE UNCONSCIONABLE EXCULPATORY CLAUSE DOES NOT LIMIT RECOVERY BY SOUTHWEST WHEN WESTINGHOUSE REPEATEDLY FAILED TO ADEQUATELY CORRECT THE DEFECTS AS PROMISED.

The lower Court, in its Opinion (TR 983) has stated that there have been no allegations of unconscionability. However, this finding by the Court is unfounded and unsupported by the record.

In the Appellant's memorandum filed with the Court on August 11, 1967, it is stated at p. 9 thereof (TR 1022):

> Uniform Commercial Code § 2-719 expressly provides that limitations of liability which are 'unconscionable' are invalid. Under the circumstances of this case, where the parties knew that the turbine-generator was to be the sole source of power for a paper mill, and stressed its reliability and adequacy for that purpose, and where the parties knew that such generators were only available from two sources within the United States, a limitation of liability to parts replacement will be 'unconscionable.' We submit that under no construction of the applicable provisions of the Uniform Commercial Code, can the disclaimer relied upon be effective.

Counsel for the Appellee, in its oral argument to the Court on August 11, 1967, also placed the issue of unconscionability before the Court. Mr. Ulrich stated:

> . . . *consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable,* limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable, but limitation of damage where the loss is commercial is not, and in addi-

> tion, *if your Honor please, this is not an unconscionable situation,* this is not a matter between a consumer and an individual car owner going down and he has got a packet inside the glove compartment of his car indicating somehow that he has a warranty, that doesn't make any sense to anybody. This is a negotiation between an engineering firm, one of the largest in the world, thoroughly knowledgeable and engaged in this again and again and again between Westinghouse Electric Corporation, which Mr. Ruyak admits that he is familiar with the standard terms and conditions of the Westinghouse warranties, and he knows what they are, and a man or an organization of which he is a part with a responsibility to obtain satisfactory warranties in this case, who in their original request for quotation expressly drafted a paragraph, Guarantee replacement of parts for a period of one year unsuited for the purpose to which we proposed and which is in conformity, and we limited ourselves to consequential damages in that matter pursuant to Section 2-719. This goes back as the court said, this was a particular order for a particular design by a firm knowledgeable, Rust Engineering Company, as to what they could expect and could obtain. This isn't the question of the unfairness or unconscionable situation to the individual single one man consumer down on the street buying from the shelf or buying a car. He has no position to negotiate. *He can't do anything about it. He either buys the car or he can't get one, and that's not this situation.* (Emphasis added)
> (Appeal Transcript, pp. 255-256)

Mr. Ulrich, in his argument to the Court with regard to unconscionability, and his analogy with a single individual purchasing a car, has hit the issue of unconscionability directly on the head. As he stated:

> He has no postion to negotiate. He can't do anything about it. He either buys the car or he can't get one, and that's not this situation. (Appeal Transcript, p. 256)

However, it so happens that this is exactly the situation that Southwest has found itself in with regard to its dealings with

Westinghouse. If the documents constituting the contract between Westinghouse and Southwest are as Westinghouse would contend, then we have exactly the same situation because: (1) there are only two suppliers of a turbine-generator unit, Westinghouse and General Electric Corporation (see Deposition of Carl E. Rodenburg, p. 20); (2) adopting the view of Westinghouse in the litigation at hand, Southwest is in no position whatsoever to negotiate with Westinghouse; (3) there is nothing Southwest can do about it; and (4) Southwest either buys the turbine-generator unit on the terms and conditions set by Westinghouse or else they cannot get one. This in effect is exactly the same situation that Southwest is in if the Court holds that the contract which existed between the parties is the contract provided by Westinghouse with their unconscionable, exculpatory clauses with regard to liability.

Therefore, it is apparent that the issue of unconscionability of the Westinghouse exculpatory clause was properly raised before the lower Court. Also, it should be noted by the Court that Rule 15(b) of the *Federal Rules of Civil Procedure* specifically provides that the issue of unconscionability was raised, as it states:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.

The test applied to determine whether or not a contract or a clause therein is unconscionable is set forth in Article II §2-302 of the *UCC,* as follows:

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> (2) *When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.* (Emphasis Added)

The unconscionable exculpatory clause (Ex. DDD) provided by Westinghouse in the case at bar, states as follows:

> Westinghouse, in connection with apparatus sold hereunder, agrees to correct any defect or defects in workmanship or material which may develop under proper or normal use during the period of one year from the date of shipment by repair or by replacement, f.o.b., factory of the defective part or parts, and *such correction* shall constitute a fulfillment of all Westinghouse's liabilities in respect to said apparatus, unless otherwise stated hereunder. Westinghouse shall not be liable for consequential damages.

It should be noted that the unconscionable exculpatory clause of Westinghouse specifically provides that "such correction shall constitute a fulfillment of all Westinghouse's liabilities." By the use of the words, "such correction" it must be deemed to mean that Westinghouse must first provide the proper correction in a non-negligent and workmanship-like manner before it can exculpate itself from liability. In the case of *Gore v. Sindelar,* 74 N.E.2d 414 (Ct. App. Ohio, 1947), the court stated the following with regard to the seller's obligation to do work in a workmanship-like manner at page 416:

> When a contract to install a machine is entered into, it needs no citation of authority in support of the rule that an agreement to do such work in a workman-like manner is an implied provision of the contract if it is not otherwise provided.

In the case at bar Southwest has alleged that Westinghouse negligently manufactured a turbine generator unit so that it failed to function and perform and that when Southwest notified Westinghouse to that effect, Westinghouse undertook to repair same but such repairs were negligently made and failed to remedy the defects caused by Westinghouse's negligence in the manufacture of said equipment. There is nothing in the record at this stage to show that Westinghouse properly, without negligence, and in a good workmanship-like manner corrected any defect or defects in the turbine generator unit but the record is to the contrary. Therefore,

it is apparent that Section 2-719(2) of the *Uniform Commercial Code* which states: "Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act" must appropriately come into effect in this situation because the circumstances and facts show that this clause has failed in its essential purpose and operates to deprive Southwest of a substantial value of the bargain if its is properly found by the trier of fact that the unconscionable Westinghouse's exculpatory clause applies in this case.

The comments to Section 2-719 of the UCC are very important to the understanding of Section 2-302, wherein it is stated:

> *However, it is of the very essence of a sales contract that at least minimum adequate remedies be available.* If the parties intend to conclude a contract for sale within this Article, they must accept the legal consequences that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract. Thus any clause purporting to modify or limit the remedial provisions of this Article in an unconscionable manner is subject to deletion and in that event the remedies made available by this Article are applicable as if the stricken clause had never existed. *Similarly, under subsection (2), where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this Article.* (Emphasis added)

The whole purpose of Section 2-302, 2-719 of the *UCC* is to allow a court not to enforce an unconscionable bargain, to strike a clause which is deemed to be unconscionable, and to enforce the contract as it reads after the expulsion, or so to limit the application of the condemned term as to avoid any unconscionable result.

In 3 Bender's *UCC Service* §14.09(3), at 14-67, the authors state the following with regard to the minimum remedies which must be available to a buyer in a sales contract:

> There must be some *minimum* type of remedy available. If the exclusive remedy provided for fails in some respect to provide adequate relief then it must be deemed an unconscion-

able clause and be stricken from the contract. In such an event, the ordinary remedies provided by the Code in all of its provisions would be available to the aggrieved party. Even though the particular exclusionary clause may be deemed fair and reasonable, if surrounding circumstances cause it to fail in its purpose or as the Comments state "operate to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this Article." (2)

(2) *ibid. E.g. if the exclusive remedy or repair fails, all of the Code remedies become available.*

The following cases deal with situations where the remedies provided for by the seller failed in their essential purpose.

In the Pennsylvania case of *Jarnot v. Ford Motor Company,* 191 Pa. Super. 422, 156 A.2d 568 (1959) (overruled on another point in 422 Pa. 383, 221 A.2d 320 at 325 (1966)), the contract of sale stated as follows:

> The Ford Motor Company Warrants all such parts of new automobiles, trucks and chassis, except tires, for a period of ninety (90) days from the date of original delivery to the purchaser of each new vehicle or before such vehicle has been driven 4,000 miles, whichever event shall first occur, as shall, under normal use and service, appear to it to have been defective in workmanship or material. *This warranty shall be limited to shipment to the purchaser without charge except for transportation of the part or parts intended to replace those acknowledged by the Ford Motor Company to be defective.* (Emphasis added) (156 A.2d at 571)

The facts show that the plaintiff purchased a Ford tractor and cab for $4,973.00 and that, within 90 days, the tractor was destroyed when an essential part of the steering mechanism—the king pin—had broken. The trailer could not be repaired and it cost $1,700.00 to repair the tractor. The plaintiff was awarded $4,800.00 for the value of the truck when destroyed, plus the cost of repairing the tractor. The court in its decision noted that the warranty applied exclusively to the replacement of a defective part, however, the court stated that this had no bearing on the question of the liability of Ford Motor Company where the failure of a defective part resulted in damage covered by another and distinct

implied warranty of merchantability and fitness for the intended use of the vehicle. The court also acknowledged that in Pennsylvania a provision in a contract pertaining to a sale that the contract contained all of the agreements between the parties did not preclude an implied warranty of merchantability.

In the case of *Cox Motor Car Company v. Castle,* 402 S.W.2d 429 (Ct. App. Ky., 1966), the purchaser of a truck brought an action against a dealer who sold him a new Chevrolet truck. The facts show that the truck had a shimmy and that the automobile dealer could not fix it and simply refused to recognize that there was anything defective with regard to the truck and tried to wash his hands of the whole affair. The exculpatory clause involved srated:

> Dealer warrants each new Chevrolet motor vehicle and chassis * * * sold by Dealer to be free from defects in material and workmanship under normal use and service, *Dealer's obligation under this warranty being limited to making good any part or parts thereof which shall,* within ninety days after delivery of such vehicle or chassis to the original purchaser or before such vehicle or chassis has been driven 4,000 miles, whichever event shall first occur, be returned to Dealer at Dealer's place of business and which Dealer's examination shall disclose to its satisfaction to have been thus defective; *this warranty being expressly in lieu of all other warranties, expressed or implied,* . . . (Emphasis added) (402 S.W.2d at 430)

The court basing its decision on Sections 2-316 and 2-719 of the *UCC* held:

> A breach having been established, *it is obvious that the contract did not contemplate that the remedy shall be by suit for specific performance of the agreement to replace the defective parts.* Clearly, the contract envisions damage in the form of monetary cost for such replacement. The trouble is that in the instant case the buyer did not know and could not reasonably be expected to know what parts were causing the shimmy. The seller, who was in the best position to identify the offending parts, simply refused to recognize that there was any defect and tried to wash his hands of the whole thing. Under those

> circumstances we think that the whole truck properly may be considered one big defective part, and the measure of damages properly would be the cost of replacing the truck with one not defective, which would be the same as the difference in market value. (Emphasis added and supplied) (402 S.W.2d at 431)

In the case at bar, we are faced with a very similar situation where Westinghouse undertook to repair but the repairs were negligently made and failed to remedy the defects, caused by Westinghouse's negligence in the manufacture of the equipment.

In the case of *Seely v. White Motor Company,* 63 Cal.2d 9, 403 P.2d 145, (1965), upon which Westinghouse has relied very strongly, involved the purchase order signed by plaintiff which stated:

> The White Motor Company hereby warrants each new motor vehicle sold by it to be free from defects in material and workmanship under normal use and service, *its obligation under the warranty being limited to making good at its factory any part or parts thereof* . . . (Emphasis added) (403 P.2d at 148)

The Supreme Court of California in rejecting the defendant's contentions, held the defendant liable and stated:

> *Defendant contends that its limitation of its obligation to repair and replacement, and its statement that its warranty is expressly in lieu of all other warranties, express or implied, are sufficient to operate as a disclaimer of responsibility in damages for breach of warranty. This contention is untenable. When as here, the warrantor repeatedly fails to correct the defect as promised, it is liable for the breach of that promise as a breach of warranty.* (Emphasis added) (403 P.2d at 148)

In the case of *Armco Steel Corp. v. Ford Construction Co.,* 237 Ark. 272, 372 S.W.2d 630 (1963) Ford and Armco entered into a contract where the latter agreed to furnish metal piping, and after the work was finished, tests made by Ford revealed breaks had developed in about 25 joints of the pipes. Thereafter, Armco sued Ford for the balance due on the merchandise ordered and delivered and Ford counterclaimed for alleged damages, upon which Ford

received a judgment against Armco for damages allegedly resulting from Armco's breach of warranty.

Ford's counterclaim set forth four basic counts which consisted of breach of contract, breach of warranty, negligence and fraud. Armco affirmatively pleaded a provision in the contract which stated:

> There are no understandings, terms or conditions not fully expressed herein. There is no implied warranty or condition except an implied warranty of title to and freedom from encumbrance of the products sold hereunder and in respect of products bought by description that they are of merchantable quality. *Seller's liability hereunder shall be limited to the obligation to replace material proven to have been defective in quality or workmanship at the time of its delivery, or allow credit therefor at its option. In no event shall Seller be liable for consequential damages or for claims for labor.*
> (Emphasis added) (372 S.W.2d 632)

On appeal, Armco relied upon the aforementioned clause in the contract stating that their only requirement was to replace material to have been defective in quality of workmanship. The Supreme Court of Arkansas had little problem with this contention by stating that at the time the pipe was delivered to Ford it was heavily coated with tar or asphalt so that in all actuality, Ford had no way of detecting whether the pipe was welded, riveted or whether it would be water tight. The main contention of Armco on appeal was that portion of the contract which stated:

> In no event shall Seller be liable for consequential damages . . .

With regard to this, the court stated:

> . . . before appellant (Armco) would be entitled to an instructed verdict, it must show that *all* damages resulting from defective materials furnished, were "consequential damages" that is, damages not recoverable under the implied warranty of fitness for the purpose intended.
> (Emphasis supplied) (372 S.W.2d at 633)

Next, the court considered the major question, as in the case at bar, as to whether consequential damages necessarily included

all damages including direct and forseeable damage and the court stated that the words "consequential damages" were not so inclusive.

Westinghouse has never seriously contended that Southwest did not have the implied warranty of fitness, the implied warranty of merchantability, and the various express warranties made by Westinghouse to Southwest. What Westinghouse is in effect saying is that even though they have not disclaimed their responsibility for these warranties, they have exculpated themselves from any liability whatsoever by their statement that they shall not be liable for consequential damages and their statement that their obligation is to repair and replace defects in workmanship or material even though correction of such defects in workmanship or material may be done in a negligent manner and in a non-workmanlike manner. This position is inconsistent with the purpose and intent of the *Uniform Commercial Code* and, in addition thereto, if Westinghouse's position is found to be correct, then this must constitute an unconscionable contract because Southwest is left without any remedy whatsoever. This position is not and cannot be the law as intended by the *Uniform Commercial Code.*

Therefore, it is respectfully submitted that since Westinghouse negligently manufactured the steam turbine generator unit so that it failed to function and perform properly, and further, that when Westinghouse undertook to repair the same, the repairs were negligently made and failed to remedy the defect caused by Westinghouse' negligence in the manufacture of the unit, Southwest is then entitled to all remedies provided by the *Uniform Commercial Code,* since the facts of the case at bar affirmatively show that the unconscionable exculpatory clause of Westinghouse has failed in its purpose and has operated to deprive Southwest of a substantial value of its bargain, assuming arguendo that there was a meeting of the minds between the parties. Therefore, the lower Court's granting of a summary judgment in favor of Westinghouse was in error.

B. THE PURCHASE PRICE PAID BY SOUTHWEST TO WESTINGHOUSE FOR THE STEAM TURBINE GENERATOR UNIT WAS EXCESSIVELY HIGH AS A RESULT OF A CONSPIRACY BY WESTINGHOUSE IN VIOLATION OF SECTION 1 OF THE SHERMAN ACT, AND AS SUCH, THE CONTRACTUAL PROVISIONS AS CONTENDED BY WESTINGHOUSE ARE UNCONSCIONABLE.

In the case at bar, Southwest, in its complaint against Westinghouse, in Count Three (TR 780) has alleged that the purchase price paid for the turbine generator unit purchased by Southwest from Westinghouse exceeded the price which Southwest would have had to pay by at least $250,000 if Westinghouse had not engaged in a conspiracy in unreasonable restraint of interstate trade and commerce in the sale of turbine generator units, in violation of §1 of the *Sherman Act* (15 U.S.C. §1).

In the case of *Central Budget Corp. v. Sanchez,* 53 Misc.2d 620, 279 N.Y.Supp.2d 391 (1967) the Court held that excessively high prices may constitute unconscionable contractual provisions within the meaning of §2-302 of the *UCC.*

Therefore, it is respectfully submitted that the contract as contended by Westinghouse may be unconscionable as a result of the alleged violation of Section 1 of the *Sherman Act* (15 U.S.C. §1), and as such, Southwest was denied the opportunity to present evidence as to its commercial setting.

In conclusion, it is respectfully submitted that the unconscionable exculpatory clause of Westinghouse, which was not brought to the attention of Southwest, failed in its essential purpose and operated to deprive Southwest of a substantial value of its bargain when Westinghouse repeatedly failed to adequately correct the defects as promised. Therefore, such an exculpatory clause is unconscionable under the *Uniform Commercial Code,* and it must give way to the general remedy provisions of the *Uniform Commercial Code.*

QUESTION IV AFFECTING SPECIFICATION OF ERROR 1, 2, 4, 7, 8, 9, 17, 18, 19, 21, 22, 23, 25, 26, and 27.

ARGUMENT

IV. When the Record on Appeal Affirmatively Shows That Westinghouse Was Negligent in the Manufacture and Repair of the Steam Turbine Generator Unit, Then Was It Proper for the Court to Grant Westinghouse' Motion for Summary Judgment Against Southwest on the Theory of Negligence When Southwest Had Established a Prima Facie Case in Negligence?

A. UNDER THE LAW OF ARIZONA, SOUTHWEST MAY RECOVER AGAINST WESTINGHOUSE ON THE THEORY OF NEGLIGENCE BECAUSE THE LIABILITY FOR NEGLIGENCE MAY CO-EXIST WITH A BUYER'S CAUSE OF ACTION FOR BREACH OF WARRANTY.

This portion of the case is to be determined under Arizona law. *Klaxon Co. v, Sentor Elec. Mfg. Co.,* 313 U. S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941); *Maloy v. Taylor,* 86 Ariz. 356, 346 P.2d 1086 (1959).

In Count One of the Appellant's Amended Complaint (TR 777) in ¶VI of Count One (TR 778), it is alleged:

> Defendant negligently manufactured said turbine generator unit so that the same failed to function and perform. As soon as plaintiff ascertained that the equipment was defective, it notified defendant to that effect and defendant undertook to repair the same but such repairs were negligently made and failed to remedy the defects caused by defendant's negligence in the manufacture of such equipment.

With regard to the Appellant's negligence counts, the Court held that there could be no recovery for consequential damages based upon a theory of negligence apart from a contractual duty. (TR 983)

The cases cited by the lower Court for its reasoning are wholly inapplicable to the case at bar. (See an analysis of case law cited by the Court at pp.1056-1074, Transcript of Record)

Therefore, it is respectfully submitted that, if under the law of Arizona, Southwest has stated a claim for relief in negligence, then the motion for summary judgment was improperly granted by the

Court with regard to Counts One and Four of Appellant's complaint, and the Appellant's Supplemental Complaint.

In the case of *Pipe Welding Supply Co., Inc. v. Gas Atmospheres, Inc.*, 201 F.Supp. 191 (E.D.Ohio 1961), the plaintiff brought an action for breach of warranty and for negligence The facts show that the plaintiff purchased from the defendant a generator that would manufacture carbon dioxide. The generator did not operate satisfactorily and leaks occurred in the firing tube of the main boiler of the generator, causing contamination of the carbon dioxide processed by the generator and purchased by the customers of the plaintiff. As a result of the contamination of the carbon dioxide, large quantities of soft drinks bottled by the customers of the plaintiff were spoiled, with the result that numerous claims for damages were made against the plaintiff. The Court determined the issues to be whether the defendant breached express warranties or an implied warranty of fitness of the generator, or whether the defendant was negligent in the manufacture of the generator, and whether the defendant's fault, if any, in one or more of the foregoing respects was the proximate cause of the damage claimed to have been sustained by the plaintiff.

The facts also show that the contract between the plaintiff and defendant contained an express warranty obligating the defendant to make good any defect due to defective material or workmanship which might develop prior to 90 days of actual service, but within one year after the completion date of the erection of the generator. The contract also contained an exculpatory clause, as in the case at bar, which stated:

> Gas Atmospheres, Inc. assumes no liability for consequential damages of any kind which result from the use or misuse of the equipment, supplied hereunder, by the Purchaser, his employees or others. (201 F.Supp. at 198)

With regard to the plaintiff's claim in negligence, which was based upon the same facts as the plaintiff's claim for breach of warranty, the Court held that the exculpatory clause of the contract did not relieve the defendant from liability for its negligence, and stated, at p. 200:

Gas Atmospheres owed Pipe Welding the duty to exercise reasonable care and skill in the manufacture of the generator. . . .

Liability for negligence may co-exist with a buyer's cause of action for breach of warranty or it may exist independently of the latter. Prosser on Torts, 2d Ed., §83, pp. 491-493. A person who undertakes to manufacture an instrumentality for use by others will be held to an expert's knowledge of the arts, materials and processes relating to his product. Harper & James, Law of Torts, §284, p. 1541. The evidence clearly establishes that defendants breached their duty to exercise reasonable care and skill in designing the firing tube of the main boiler. (201 F.Supp. at 200) (Emphasis added)

The case of *Asphaltic Enterprises, Inc., v. Baldwin-Lima-Hamilton Corporation,* 39 F.R.D. 574 (E.D.Pa. 1966), involved a buyer's action against a seller for damages for breach of warranty. The facts show that the plaintiff contracted for the purchase of a machine for manufacturing asphalt and alleged the defendant had breached his express warranty that the machine was free from defective workmanship and material, due to the fact that the machine had not produced any merchantable asphalt.

The contract between the parties contained, as in the case at bar, various exculpatory clauses, one of which stated:

> Seller shall under no circumstances be liable for any expense, indirect or consequential damages in connection with the sale or use of the property or otherwise. Buyer waives any right to damages for breach of warranty in the event of rescission by it. *Seller warrants that the property covered hereby . . . is free from defective workmanship and material provided that any claim arising from defective workmanship and materials must be presented to Seller within six (6) months from the date hereof and upon presentation thereof Seller is obligated only to replace at its factory such parts as may appear to Seller, upon inspection by Seller, to have been defective in workmanship or material.*
> (Emphasis supplied) (39 F.R.D. at 575)

In his brief opposing the defendant's motion for dismissal, the plaintiff made no attempt to assert the contractual grounds necessary for the recovery of consequential damages and he relied entirely upon the law of damages with respect to negligence actions based upon a breach of duty arising from a contractual relationship, drawing his support from the case of *Pipe Welding Supply Co., Inc. v. Gas Atmospheres, Inc., supra.*

At the oral argument the defendant pointed out the absence in plaintiff's complaint of any intimation that he wished to proceed in tort rather than in warranty. The Court had no difficulty whatsoever with the argument posed by the defendant, stating that all that was required of the plaintiff was to place the defendant on notice as to the nature of his claim, which the plaintiff had done. The Court further stated that the plaintiff need not specify his theory of recovery, nor was it necessary that the plaintiff set forth in detail the facts upon which such theory rested, holding that where a party has a sound claim he should recover on it regardless of his counsel's failure to perceive the true basis of the claim.

In the case of *McClure v. Johnson,* 50 Ariz. 76, 69 P.2d 573 (1937), the cause of action arose out of an automobile accident near Phoenix. Prior to the accident the plaintiff, who lived in Missouri, decided to move to California, and Johnson (one of the plaintiffs) learned of this fact and entered into an agreement with the deceased plaintiff whereby Johnson was to pay the decedent $20 for transporting Johnson and his family from Missouri to California. While enroute to California an accident occurred in Arizona and the decedent plaintiff was killed in the accident and the Johnson family was injured.

The question that the Court considered was whether the action was one for breach of contract or for tort.

With regard to this issue, the Court stated the following at p. 578:

> We think a good test to be used in determining whether a pleading sets up a case in contract or in tort may be stated as follows. When an act complained of is a breach of specific terms of the contract, without any reference to legal duties imposed by law upon the relationship created thereby, the

action is in contract, but where there is a contract for services which places the parties in such a relation to each other that, in attempting to perform the promised service, a duty *imposed by law as a result of the contractual relationship between the parties* is violated through an act which incidentally prevents the performance of the contract, then the gravamen of the action is a breach of the legal duty, and not of the contract itself, and in such case allegations of the latter are considered mere inducement, showing the relationship which furnishes the right of action for the tort, but not the basis of recovery for it, and in such cases the remedy is an action ex delicto. As was said in Pecos & N.T.Ry.Co. v. Amarillo St.Ry.Co. (Tex.Civ.App.) 171 S.W. 1103, 1105:

> If the transaction had its origin in a contract which places the parties in such relation as that in performing or attempting to perform the service promised the wrong is committed, then the breach of the contract is not the gravamen of the action. There may be no technical breach of the letter of the contract; the contract in such case is a mere inducement and should be so pleaded. It induces, causes, creates the conditions or state of things which furnishes the occasion for the wrong. *It is the wrong outside the letter of the contract which is there the gravamen of the suit.*

(Emphasis supplied)

The Court went on to hold that what was imposed upon the decedent was a contractual relationship between the parties, as a result of which the law imposed certain legal duty on the decedent, to-wit, to carry plaintiffs with reasonable care and that in an attempt to carry out this contract, he committed an act which was a breach, not of the contractual duty, but of the legal duty, which act resulted in the injuries complained of by the various plaintiffs. The Court also stated that the obligation of reasonable care in such transportation was not imposed by the contract, but by the law, as a result of the relationship arising out of the contract, and that the remedy for a breach of that obligation was in tort and not in contract.

For other cases holding that duties created by contract, when breached through negligence, give rise to actions *ex delicto,* see:

Siegel v. Struble Bros., Inc., 150 Pa.Super. 343, 28 A.2d 352 (1942); *Eads v. Marks,* 39 Cal.2d 807, 249 P.2d 257 (1952); *Holmes v. Schnoebelen,* 87 N.H. 272, 178 A. 258 (1935); *Whittle v. Miller Lightening Rod Co.,* 110 S.C. 557, 96 S.E. 907 (1918); *Flint & Walling Mfg. Co. v. Beckett,* 167 Ind. 491, 79 N.E. 503 (1906); *Kahler v. Liberty Mut. Ins. Co.,* 204 F.2d 804 (8th Cir. 1953); *Harzfeld's, Inc. v. Otis Elevator Co.,* 114 F.Supp. 480 (W.D.Mo. 1953); *Gore v. Sindelar,* 74 N.E.2d 414 (Ct.App. Ohio 1947); and 52 Am.Jur. *Torts* § 27.

Although involving a common carrier, the case of *Apache Ry. Co. v. Shumway,* 62 Ariz. 359, 158 P.2d 142 (1945), should be noted by the Court because in the *Shumway* case, *supra,* the Supreme Court of Arizona specifically held that "Relief from negligence cannot be contracted away." Although the *Shumway* case, *supra,* is not on all fours, this case is very persuasive that in the event the Supreme Court of the State of Arizona were to decide this question that the Arizona Court would not allow Westinghouse to exculpate itself from its own negligence by a contractual provision.

In the case at bar, there has been no showing by Westinghouse, upon whom the burden rests in a motion for summary judgment, to show that the steam turbine generator unit was not negligently manufactured and that the subsequent repairs performed by Westinghouse's employees were not negligently and carelessly made. However, the record is replete with evidence which shows that the steam turbine generator unit was negligently made and that when Westinghouse undertook to repair the unit, such repairs were negligently made and failed to remedy the defects caused by Westinghouse's negligence in the original manufacture of the equipment. Southwest, in order to make the Court aware of the negligence and negligent repair of Westinghouse, feels it is imperative that the Court be informed of the contents of a few portions of the multitude of depositions which have been taken in this case so that the Court may more fully understand the acts and the conduct of the Appellee, Westinghouse, and its employees. [See, Summary of Depositions, Appendix No. Two]

Therefore, it is respectfully submitted that the record is replete with evidence which affirmatively shows the steam turbine generator unit was negligently made by Westinghouse, and that when Westinghouse undertook to repair the unit, such repairs were negligently made and failed to remedy the defects caused by Westinghouse' negligence in the original manufacture of the equipment. It is further submitted that Southwest may recover against Westinghouse on the theory of negligence, because liability from negligence may co-exist with a cause of action for breach of warranty and as such, the trial Court's granting of a summary judgment against Southwest on the theory of negligence and the granting of the summary judgment should be reversed, thereby allowing Southwest the recovery to which it is entitled.

QUESTION V AFFECTING SPECIFICATION OF ERROR 1, 2, 3, 4, 5, 6, 7, 8, 11, 16, 17, 18, 19, 20, 21, 23, and 26.

ARGUMENT

V. Is the Granting of a Summary Judgment Proper When the Moving Party Has Not Shown That It Is Entitled to a Judgment as a Matter of Law?

A. EVEN ASSUMING, ARGUENDO, THAT THE WESTINGHOUSE UNCONSCIONABLE EXCULPATORY CLAUSE APPLIES TO CONSEQUENTIAL DAMAGES, WESTINGHOUSE, AS THE MOVING PARTY, HAS NOT SHOWN AS A MATTER OF LAW THAT SOUTHWEST IS NOT ENTITLED TO RECOVER INCIDENTAL DAMAGES.

The damages recoverable by an aggreived buyer under the *Uniform Commercial Code (UCC)* are set forth in Article II, §2-715, which states:

> (1) *Incidental damages resulting from seller's breach include* expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and *any other reasonable expense incident to the delay or other breach.*
> (Emphasis added.)
>
> (2) Consequential damages resulting from the seller's breach include
>
> (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting

had reason to know and which would not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach of warranty.

Although the term "incidental damages" may be a new word of art in the law, this is the same type of damage that was recoverable under the Uniform Sales Act. 3 Bender's *Uniform Commercial Code Service* §14.07(2), at 14-61 states the following with regard to incidental damages:

> They are those which naturally arise from the breach and which are incurred by the buyer in the normal handling of the goods. Again these elements listed in Subsection (1) are not meant to be exclusive but merely explanatory of the type of incidental damage which a buyer can suffer and for which he should be reimbursed. There is no real difference between the Code and the Uniform Sales Act even though the Uniform Sales Act did not contain any specific provisions with regard to incidental damages. The cases under the Uniform Sales Act followed approximately the same line as the Code has adopted, so as a practical matter, the Code has not made a significant change with regard to incidental damages.

Under the *UCC* the test as far as consequential damages are concerned is whether or not the seller at the time of the contract had reason to know of the particular needs or requirements of the buyer. If the seller knew of the particular needs or requirements of the buyer, then in that case he should be liable for any loss that results. See 3 Bender's *Uniform Commercial Code Service* §14.07(2), at 14-61.

The Court, in its Opinion, has stated: "All damages sought by Southwest in this case are consequential damages." (TR 981) However, it should be noted that many of the items of damage sought by Southwest are, in fact, incidental damages.

In the case of *Willred Company v. Westmoreland Metal Mfg. Co.*, 200 F.Supp. 59 (E.D.Pa. 1961), the Court, deciding the case under the *Uniform Commercial Code* as adopted in Pennsylvania, distinguished between consequential and incidental damages which were recoverable by a buyer upon the seller's breach.

The *Willred* case arose out of an action for breach of an exclusive distributorship contract and for late and defective deliveries under the contract. The Court held that the plaintiff was entitled to recover $69,500.75 for breach of the exclusive distributorship contract based entirely upon the profit which the plaintiff would have been able to realize by contract if the contract had been carried out. The Court also held that the plaintiff was entitled to recover incidental damages as defined in Article 2, §2-715. With regard to the incidental damages, the Court held that the plaintiff was entitled to recover for following incidental damages under §2-715 of the *Uniform Commercial Code.*

1. The plaintiff would, upon satisfactory proof, be entitled to damages in the amount of the difference between the cost of its cover and defendant's price to it.

2. The plaintiff's cost of having the defective products repaired, charging defendant with the cost of the work, including incidental expenses as well as direct labor cost including overhead.

3. The plaintiff's cost of materials used in making repairs to correct the defective products.

4. The plaintiff's expenses with regard to travel expenses incurred by its repairmen in the field.

5. The expenses incurred by plaintiff because of the defendant's late delivery of the various products.

6. "Although my attention has not been called to any case in which a buyer has been allowed interest on amounts withheld by a subpurchaser from him because of defects in the goods, I believe that Section 2-714(3) and 2-715 of the Uniform Commercial Code provide for the recovery of such damages if they can be proved. Any plaintiff suing for a balance due from a defendant is entitled to interest from the date of the defendant's refusal to pay, and I see no reason in principal why, in a case like the present, the plaintiff should not be allowed to recover interest on money due but withheld by a third party for varying periods of time, the delay being due to the defendant's breach of contract." (200 F.Supp. at 69)

Therefore, it is respectfully submitted that before the Appellee is entitled to a summary judgment, it must also show, as the moving party, that it is entitled to a judgment as a matter of law and, that the Appellant has sustained no damages whatsoever which are not

recoverable. The Appellee has failed to meet these requirements, because even assuming arguendo that the unconscionable warranty of Westinghouse applies in the case at bar, then the Appellee has not shown as a matter of law that the Appellant is not entitled to recover incidental damages resulting from the Appellee's breach.

The Court in its Order and Judgment (TR 1010) stated:

> There is no evidence before the Court that the defendant had failed to perform its affirmative warranty duties of correction and replacement.

Even though the burden is on the Appellee, Westinghouse, to show that they affirmatively performed their warranty duties, as a moving party on a motion for summary judgment, the evidence of a breach is still in the evidence before the Court. Mr. Baker in his testimony before the Court on the trial of the matter stated that Southwest encountered unusual and unanticipated difficulties in the turbine generator. [See, Testimony of Mr. Baker, Appendix Two]

Also, it should be noted by the Court that the allegations contained in the Appellant's complaint, which allege that Westinghouse was negligent in the manufacture of the equipment, have not been controverted by Appellee, nor have the allegations of the Appellant's complaint alleging that Westinghouse made certain repairs in a negligent manner been controverted by the Appellee as the moving party, upon whom the burden rests in a motion for summary judgment. However, the record is replete with evidence which shows that the Appellee was negligent in the manufacture of the equipment and that when it undertook to repair the turbine generator unit, that in fact, such repairs were negligently made, and in fact failed to remedy the defects caused by the Appellee's negligence in the original manufacture of the equipment. See also the Depositions of Messrs. Paul Kelly, Ralph Willard LeGates, Henry A. Parzick and Raymond E. Baker.

A case involving a similar fact situation as in the case at bar and also involving an unconscionable clause in which the seller attempted to exculpate himself from consequential damages, is the case of *Armco Steel Corp. v. Ford Construction Co.*, 237 Ark. 272, 372 S.W.2d 630 (1963). In this case, Ford and Armco entered into

a contract wherein the latter agreed to furnish some metal piping to Ford. After the pipe had been all laid and the work finished, tests were made by Ford which revealed that the pipe had developed leaks in about 25 joints of such pipe. Thereafter, considerable settlement negotiations were ineffective, and Armco sued Ford for the balance due on the merchandise ordered and delivered, and Ford counterclaimed against Armco for damages. Ford received a judgment against Armco as a direct and proximate result of Armco's breach of warranty.

Ford's counterclaim set forth four basic counts:

(1) Breach of Contract
(2) Breach of Warranty
(3) Negligence
(4) Fraud

All four of Ford's counts basically alleged that the materials furnished by Armco failed to meet the required specifications and Armco affirmatively pleaded a provision in the contract which stated:

> There are no understandings, terms or conditions not fully expressed herein. There is no implied warranty for condition except an implied warranty of title and freedom from encumbrances of the products sold hereunder, and in respect of products bought by description that they are of merchantable quality. *Seller's liability hereunder shall be limited to the obligation to replace material proven to have been defective in quality of workmanship at the time of delivery, or allow credit therefor at its option. In no event shall seller be liable for consequential damages or for claims for labor.* (Emphasis added.) (372 S.W.2d at 632)

On appeal, Armco contended and relied upon a clause in the contract which stated that the seller's liability was limited to the obligation to replace material proven to have been defective in quality of workmanship. The Supreme Court of Arkansas had no problem with Armco's contention, and dismissed this contention by stating that at the time the pipe was delivered to Ford it was heavily coated with tar or asphalt so that in all actuality Ford had no way

of detecting whether the pipe was welded or riveted, or whether it would be water tight.

However, the main contention of Armco, as Westinghouse in the case at bar, was that portion of the contract which read:

> In no event shall seller be liable for consequential damages. (372 S.W.2d at 633)

The Supreme Court of Arkansas in meeting Armco's contention head-on, stated:

> ... Before Appellant would be entitled to an instructed verdict, it must also show that *all* damages resulting from defective materials furnished, were 'consequential damages' — that is, damages not recoverable under the implied warranty of fitness for the purpose intended. After careful consideration we have concluded there is evidence in the record to show Ford did suffer some amount of damages resulting from Armco's breach of warranty regardless of whether such damages are termed consequential damages, direct damages, or foreseeable damages. It is not denied that the pipe leaked, or that Ford suffered a financial loss in trying to correct the defective pipe and in removing the same. It was up to the jury to say whether Ford acted reasonably in failing to detect the defects in the pipe before it was installed. (372 S.W.2d at 633) (Emphasis supplied)

Next, the Court considered the major question to be decided, as in the case at bar, was *"whether 'consequential damages' necessarily include all damages including direct and foreseeable damages."* (Emphasis added.)

The Court in its holding stated:

> We hold the quoted words are not so inclusive, as many authorities indicate. Black's Law Dictionary (4th ed.) defines 'consequential damages' as
>
> 'Such damage, loss, or injury as does not flow directly and immediately from the act of the party, but only from some of the consequences or results of such act.'
>
> In the case of Despatch Oven Co. v. Rauenhorst, 229 Minn. 436, 40 N.W.2d 73, 79 (1949) they had this to say:
>
> > 'The 'consequential' damages referred to in the clause in question are such damages as do not arise directly according to the usual course of things, from the breach

> of the contract itself, but are rather those which are the consequence of special circumstances known to or reasonably supposed to have been contemplated by the parties when the contract was made' (Citing cases.)

In the case of General Talking Pictures v. Shea, 187 Ark. 568, 61 S.W.2d 430, we said that if a disclaimer is effective at all, it will not extend by implication to liabilities which it does not by its express terms cover. There is, of course, no contention of Armco here that its disclaimer covered any particular items of damages. In 17 C.J.S. Contracts, §262 it is stated:

'Contracts of this nature are not favored by the law; they are strictly construed against the party relying on them, and clear and explicit language in the contract is required to absolve a person from such liability.'

5 Corbin, Contracts §1011, in discussing Causation and Foreseeability, states:

> 'Another form in which the present rule is often stated is that damages are recoverable only for injuries that are the natural result of the breach. This seems to have no meaning other than that there was reason to foresee such injury.' (372 S.W.2d at 634)

The Court went on to state that Armco could have reasonably foreseen that a leaky pipe would cause damage to Ford and that a leaky pipe would not be usable, and that it would have to be removed, and that this would be expensive to Ford. Quoting from the previous case of *Main & Co. v. Dearing,* 73 Ark.470, 84 S.W. 640, (1905) the Court went on to state:

> *The purchaser cannot be supposed to buy goods to lay them on a dunghill.* (Emphasis Added.) (372 S.W.2d at 634)

The court went on to state that it would be unreasonable to hold, as it would be in the case at bar:

> *That Armco could warrant its product to be useful in one breath and then in the next breath disclaim all liability if it is unusable.* It is our conclusion that Appellant (Armco) was subject to liability in some amount for a breach of its implied warranty and, therefore, was not entitled to a directed verdict in its favor on Ford's counterclaim.
> (372 S.W.2d at 634)
> (Emphasis added)

In the case at bar, Westinghouse has not shown as a matter of law that all damages sustained by Southwest were consequential damages and in the case at bar, as in the *Armco* case, *supra,* Westinghouse has not effectively excluded or modified the implied warranty of fitness for a particular purpose or the implied warranty of merchantability.

In the *Armco* case, *supra,* as in the case at bar, the only way that Southwest could have discovered defects in the turbine generator as existed were to place the turbine generator in operation and subject it to performance. Only when this was done did it become evident that the turbine generator supplied by Westinghouse was not of merchantable quality nor fit for the purpose intended.

In the lower Court's Opinion (TR 978) it is stated that Southwest was, "Claiming damages by reason of lost time, labor, materials, and loss of business."

In Footnote 2 to the lower Court's Opinion (TR 986), the Court stated that the damages sought by Southwest:

> Include recovery of fixed operating costs for the period of delay in the start-up of the mill caused by difficulties with the turbine generator unit, *the cost of repairs made by Rusk Engineering Company to the turbine generator unit, and additional caustic (used in the paper making process) purchased to offset that loss from the recovery boiler as a result of shut-down of the turbine, together with costs of fixed operating costs and costs of repair relating to the exciter unit.* (Emphasis added)

The lower Court has classified these as "consequential damages" based apparently upon Appellee's Interrogatory No. 22(c) (TR 24), which requested:

> 1. The total dollar value of *consequential damages* caused by the repairs or adjustments which were performed on each date or dates mentioned in answer to Interrogatory No. 22(a) above.
>
> 2. For each interruption, specify in actual dollar values how much of the total *consequential damages* attributed to each interruption is allocated to:
>
> (a) lost time
> (b) lost labor

(c) lost profits
(d) lost materials
(e) other (Emphasis added)

It should be noted that the Appellee in Interrogatory No. 22(c) (TR 24) sought information concerning *"consequential damages"* and not *"incidental damages,"* and therefore, in order to determine the legal meaning of the term "consequential damages" the Court must consider that term as defined in §2-715 of the *UCC* and the case law actually defining the term "consequential damages."

In the case of *Boylston Housing Corporation v. O'Toole,* 321 Mass. 538, 74 N.E.2d 288 (1947) the Court discusses the distinction between "direct" and "consequential" damages with regard to an exculpatory clause which states that the defendant, Otis Elevator Company, "...in any event...shall not be liable for consequential damages".

The Court stated, with regard to the distinction between "direct" and "consequential" damages, as follows:

> *On the other hand, it is apparent that the agreement that the defendant shall not be liable for consequential damages is not to be interpreted as meaning that the defendant shall not be liable for any damages whatsoever....The natural interpretation of 'consequential damages' as used in the contract is that it does not refer to damages that 'flow according to common understanding as the natural and probable consequences of the breach,' that is, those arising naturally 'according to the usual course of things, and from such breach of the contract itself,' . . . 5. We think that the provision against liability for 'consequential' damages, naturally interpreted, provides against liability for damages that do not arise 'according to the usual course of things, from such breach of contract itself' that is, against liability for 'special' damages that are the consequences of special circumstances known to the parties at the time the contract was made.*
> (Emphasis added) (74 N.E.2d at 302)

In the case at bar, the Appellee, Westinghouse, even assuming the unconscionable exculpatory warranty provisions prepared by them apply, has not shown that the Appellant, Southwest, would

not be able to recover any damages whatsoever, and as such, the granting of a summary judgment was improper.

In the case of *United States v. Chicago B&Qr. Co.,* 82 F.2d 131 (8th Cir. 1966) the Court stated, with regard to consequential damages:

> Ordinarily, 'consequential damages' are those which do not arise from any immediate, natural, and probable result of the act done, but arise from the interposition of an additional cause, without which the act done would have produced no harmful result; while 'proximate damages' are those which accrue directly and in natural sequence, and as a specific (hurtful) result of the act done, without the intervention of an independent cause. (82 F.2d at 136)

In the case of *J. C. Penney Company v. Westinghouse Electric Corporation,* 351 F.2d 561 (7th Cir. 1965), the Court held that damages resulting directly from the injuries sustained are not consequential in nature.

Another case which allowed recovery of incidental damages is the case of *Lanners v. Whitney,* 428 P.2d 398 (Ore. 1967) which involved a suit to cancel a contract for the purchase of a used airplane and in regard to damages recoverable by the agreed purchaser the Court, relying upon §2-715 of the *UCC,* held that the plaintiff was entitled to the cancellation of the contract and recovery of so much of the purchase price as had been paid, including the value of the airplane given to the defendant as part of the purchase price, and in addition thereto:

> . . . plaintiff may recover for incidental damages as provides in ORS 72.7110 and 72.7150 for expenses reasonably incurred as a result of seller's breach, including those incurred in the care and custody of the goods. Comment 2 to ORS 72.7110 tells us that such expenses are measured by their cost. We find that plaintiff is entitled to recover the amounts spent in repair on the aircraft on the Chicago trip, amounts spent to preserve the craft after the Chicago trip, including cost of removal of the radio and battery, installation of storage oil, ground insurance and storage charges. (428 P.2d at 404)

Also, the fact that Southwest may have computed their damages through the use of an improper measure of damages does not render

their claim invalid. In the case of *United States v. Light,* 3 F.R.D. 3 (M.D.Pa. 1943) the plaintiff filed a motion for summary judgment which was predicated upon the proposition that defendant's claim for damages, by way of credit, was one for liquidated damages, and since the contract between plaintiff and defendant did not contain any agreement for liquidated damages, the defense was without merit. The Court, while dismissing plaintiff's contention and denying its motion for summary judgment, stated the following, at p. 5:

> This contention fails because there is no rule requiring the claimant to specify items of general damage, and a claim is sufficient if it sets forth a claim for a lump sum. Furthermore, even though the amount claimed was computed through the use of an improper measure of damages, or included items not properly recoverable, the claim is not rendered invalid thereby.

Therefore, it is respectfully submitted that under the controlling Pennsylvania law as found in the case of *Willred Company v. Westmoreland Mfg. Co., supra,* and its interpretation of §2-715 of the *UCC,* and the cases defining incidental and consequential damages, that in the case at bar, Westinghouse, assuming arguendo that their unconscionable exculpation of consequential damages applies, would be liable to Southwest for any incidental damages sustained by Southwest and some if not all of the damages sustained by Southwest are incidental damages.

Also, the case of *Armco Steel Corporation v. Ford Construction Co., supra,* sets forth the requirement that Westinghouse must show that *all damages* which resulted from the defective products supplied by Westinghouse to Southwest were "consequential damages." This they have not done because in the Court's own words, Southwest is seeking *"the cost of repairs made by Rusk Engineering Company to the turbine generator unit, an additional caustic* (used in the paper making process) *purchased to offset that loss from the recovery boiler as a result of the shut-down of the turbine,* together with recovery of fixed operating costs *and the cost of repairs relating to the exciter unit."* These are items of incidental damages.
(Emphasis added)

In conclusion, it is respectfully submitted that, assuming arguendo that the Westinghouse unconscionable exculpatory clause applies, the granting of a summary judgment in this case by the lower Court was improper because Westinghouse has not shown as a matter of law that all of the damages sustained by Southwest are non-compensable, and as such, Westinghouse has failed in its heavy burden to show that it is entitled to a judgment as a matter of law.

QUESTION VI AFFECTING SPECIFICATION OF ERROR 3, 7, 8, 9, 10, 12, 13, 18, 21, 22, 26, and 27.

ARGUMENT

VI. Did the Lower Court Improperly Grant Westinghouse' Motion for Summary Judgment Based Upon the Theory of Strict Liability in Tort When All Indications Would Show That the Supreme Court of the State of Arizona Would Grant Recovery to Southwest in Strict Liability in Tort in the Case at Bar?

A. ARIZONA HAS ADOPTED THE DOCTRINE OF STRICT LIABILITY IN TORT.

Starting in 1964, a series of five Arizona decisions must be analyzed in determining Arizona's position with regard to the infant tort of strict liability.

Colvin v. Superior Equipment Company, 96 Ariz. 113, 392 P.2d 778 (1964) was an appeal by the defendant who was sued by the conditional seller to recover a deficiency arising from the repossession of a power shovel. The defendant counterclaimed, alleging that the shovel had a defectively welded replacement part, which gave rise to an accident, thus delaying performance by the defendant of a construction contract. The court cited *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57, 27 Cal.Reptr. 697, 377 P.2d 897 (1962) in support of its finding that an implied warranty is equally as applicable when made by a dealer to his customer as when made by a manufacturer to the customer.

Next followed the case of *Nalbandian v. Byron Jackson Pumps, Inc.*, 97 Ariz. 280, 399 P.2d 681 (1965) which involved the break-

down of an electric submersible pump sold by defendant to plaintiff's predecessor in interest. The trial court gave judgment for defendant and plaintiff appealed. The Supreme Court reversed and directed that judgment be entered for the plaintiff, holding that plaintiff was entitled to relief under either theory, express or implied warranty.

The importance of the *Colvin* and *Nalbandian* cases, *supra,* lies in the fact they both were product-failure cases, not personal injury cases, and particularly, when read in light of Justice Lockwood's concurring opinion in *Nalbandian, supra.* She reminds the Court that it cited *Greenman, supra,* as authority in *Colvin,* realizing that *Greenman* is a strict liability and tort case. She reiterated the statement in *Colvin* that the same rationale is to be applied whether "we are concerned with an injured man 'as the foundation of accident liability, or by the purchaser to avoid a contract.' " (399 P.2d a5 687)

Then, in 1967, in the case of *O. S. Stapley Company v. Miller,* 6 Ariz. App. 122, 430 P.2d 701, the Arizona Court of Appeals expressly adopted strict liability where the plaintiff was thrown from the front deck of a boat when it suddenly swerved due to an allegedly defective steering mechanism. Citing *Nalbandian, Colvin, Phillips v. Anchor Hocking Glass Corp.,* 100 Ariz. 251, 413 P.2d 732 (1966), *Crystal Cola-Cola Bottling Co. v. Cathey,* 83 Ariz. 163, 317 P.2d 1094 (1957), and the California case of *Greenman v. Yuba Power Products Inc., supra.*

The Arizona Court of Appeals again applied strict liability in *Bailey v. Montgomery Ward and Company,* 6 Ariz. App. 213, 431 P.2d 108 (1967), where an infant plaintiff was denied recovery by the trial court for injuries resulting when a pogo stick purchased from the defendant disintegrated. Reversing the trial court, the Court of Appeals remanded the decision for application of the doctrine of strict liability in tort as enunciated previously in *Stapley, supra.*

The Arizona Supreme Court has yet to face foresquare the question of strict liability, but the case of *Shannon v. Butler Homes, Inc.,*

102 Ariz. 312, 428 P.2d 990 (1967) indicates its approval of the doctrine:

> The allegation of implied warranty adds nothing to appellant's case. The liability of a manufacturer of an article is in tort (see Phillips v. Anchor Hocking Glass Corp., 100 Ariz. 251, 413 P.2d 732, *and concurring opinion of Justice Lockwood in Nalbandian v. Byron Jackson Pumps,* 97 Ariz. 280, 399 P.2d 681), and it is not assumed by agreement but imposed by law. (428 P.2d at 993) (Emphasis supplied)

Noteworthy is the fact that the Supreme Court, in citing authority for the proposition that the liability of a manufacturer of an article is in tort, cited the concurring opinion of Justice Lookwood in *Nalbandian, supra.*

There can, therefore, be little reasonable doubt that the Arizona Supreme Court approves the doctrine of strict liability in tort and that it will vigorously apply it when faced with the question. Furthermore, by virtue of Justice Lockwood's interpretation of the doctrine and statement that it applies in the type of cases as presented in *Colvin* and *Nalbandian, supra,* is strong persuasion that the Arizona court refuses to limit the doctrine to personal injury cases only.

The New Jersey court, in *Santor v. A. and M. Karagheurian,* 44 N.J. 52, 207 A.2d 305 (1965) has sustained the position advanced by Appellant in the case at bar. Santor sued the manufacturer of a defective carpet for which he recovered on the theory of Strict Liability in Tort.

Arizona has apparently aligned itself with the thinking of the *Santor* case, *supra.* The nature of the loss and the recovery granted parallel that which is sought herein. That Court ignores the arbitrary distinctions imposed in *Seely v. White Motor Company,* 45 Cal.Rptr. 17, 403 P.2d 145 (1965), and is in line with the reasoning of Justice Peters' dissent. This case, it is submitted, when read in conjunction with the Arizona cases, reflects the position the Arizona court would assume if the case at bar was before it.

B. IN APPLYING THE DOCTRINE OF STRICT LIABILITY IN TORT, THERE IS NO VALID REASON FOR DENYING RECOVERY FOR LOSS INCURRED BY SOUTHWEST.

The lower Court in its Opinion states:

> All damages sought by Southwest in this case are consequential damages. (TR 981)

That fact apparently is the basis for the lower Court's decision in denying the applicability of strict liability in tort. In fact, the Court cites *Rossignol v. Danbury School of Aeronautics, Inc.,* 154 Conn. 549, 227 A.2d 418 (1967) in which the Connecticut court, applying the elements set forth in Restatement Second, *Torts* §402A, requires as a basis for recovery that the defective product cause ". . . physical harm to the consumer or user or to his property . . ." (227 A.2d at 424).

The lower Court then states in the Footnote to its Opinion:

> None of these elements is presented here. (TR 998)

There was in fact physical damage done to the property of the plaintiff: scoring in the cylinder wall of the mechanism as well as on the piston (Appeal Transcript, pp 134-135); burning of one bar of the armature of the exciter (Appeal Transcript, p. 139); two additional bars were badly burned (Appeal Transcript, p. 144).

Appellants in the case at bar are persuaded by the reasoning of Justice Peters' in his dissent in *Seely v. White Motor Company, supra,* as follows:

> In Greenman we allowed recovery for 'personal injury' damages. It is well established that such an award may include compensation for past loss of time and earnings due to the injury . . . for loss of future earning capacity . . . and for increased living expenses caused by the injury. . . . There is no logical distinction between these losses and the losses suffered by plaintiff here. All involve economic loss, and all proximately arise out of the purchase of a defective product. *I find it hard to understand how one might, for example, award a traveling salesman lost earnings if a defect in his car causes his leg to break in an accident but deny that salesman his lost*

earnings if the defect instead disables only his car before any accident occurs. The losses are exactly the same; the chains of causation are slightly different, but both are 'proximate.' Yet the majority would allow recovery under strict liability in the first situation but not in the second. This, I submit, is arbitrary.

This 'history' of products liability law does not compel a dichotomy between 'economic loss' and other types of damage. Although the various products liability doctrines developed in the field of personal injury claims, the overwhelming majority of courts *today* make no distinction between personal injury damages and property damages (including 'economic loss') in products liability cases. If no such distinction was made under the products liability doctrines in use *before* Greenman, then such a distinction *under* Greenman's strict-liability doctrine may be reasonably (though not necessarily) made only on the basis that protection of life and limb is of greater social value than protection against financial loss. But, as money damages do not replace the life or limb lost, this basis is sound only to the extent that allowing recovery for personal injuries on a strict liability theory operates as a *deterrent* (vis-a-vis the theories formerly used) which induces manufacturers to be *more* careful in their production methods. But it is highly doubtful that Greenman's imposition of strict liability does furnish such a deterrent, in view of the fact that, at the time Greenman was rendered, the doctrine of *res ipsa loquitur* and the weakening of the 'privity' requirement in implied warranty actions would have often subjected the manufacturer to liability, or at least to litigation, in any event, whenever a defect in his product caused an injury. (403 P.2d at 153-154) (Emphasis added and supplied)
(Citations omitted)

As further rebuttal of the majority reasoning to the effect that the risk of personal injury and damages should be borne by the manufacturer because "the cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured" Justice Peters argues:

Conversely, an economic loss might be an 'overwhelming misfortune' in a given case, but I doubt that any court would

> allow recovery in such a case and deny it in other economic loss cases. 'Overwhelming misfortunes' *might* occur more often in personal injury cases then in property damage or economic loss cases (although the majority cite no evidence to this effect), but this is no reason to draw the line between these types of injury when a more sensible line is available. *Suppose, for example, defective house paint is sold to two home owners. One suffers temporary illness from noxious fumes, while the other's house is destroyed by rot because the paint proved ineffective (a loss generally uninsured). Although the latter buyer may clearly suffer the greater misfortune, the majority would not let him recover under the strict liability doctrine because his loss is solely 'economic,' while letting the first buyer recover the minimal costs and lost earnings caused by his illness.*
> (403 P.2d at 155-156)
> (Emphasis added and supplied)

If the law of torts is to be applicable to the corporate plaintiff as well as the individual plaintiff, then it should be recognized that a corporation cannot be "personally injured." Furthermore, it cannot incur pain and suffering, grief and other various elements uniquely damaging to the person. Basically, the corporation's only potential injury lies in its pocketbook.

In conclusion, it is therefore respectfully submitted that the trial Court improperly granted Westinghouse' motion for summary judgment as to Count Two of Southwest's complaint, because at the present time all indications affirmatively show that the Supreme Court of the State of Arizona would grant recovery to Southwest based upon a theory of strict liability in tort.

QUESTION VII AFFECTING SPECIFICATION OF ERROR 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, and 26.

ARGUMENT

VII. When a Seller Has Not Disclaimed Express and Implied Warranties, Can the Seller Effectively Disclaim Express and Implied Warranties Given by Merely Restricting the Damages and Remedies of the Buyer Without Complying With the Precise Requirements for Disclaimer of Express and Implied Warranties as Provided for in the Uniform Commercial Code?

A. ASSUMING ARGUENDO, THAT THE UNCONSCIONABLE EXCULPATORY CLAUSE OF WESTINGHOUSE APPLIES, THEN WESTINGHOUSE HAS NOT DISCLAIMED THE EXPRESS AND IMPLIED WARRANTIES GIVEN TO SOUTHWEST AND WESTINGHOUSE SHOULD NOT BE ALLOWED TO DO SO BY USING AN INCONSPICUOUS UNCONSCIONABLE EXCULPATORY CLAUSE LIMITING THE REMEDY OF SOUTHWEST.

In the case at bar, Westinghouse has warranted the high reliability of their product in one breath, and in the next breath, and in fact on the back of the same page where they warrant the high reliability of their product, they atempt to disclaim all liability in the event their product did not have the high reliability previously stated. In the Appellee's Exhibit (Letter from Mr. J. J. Sherman on behalf of Westinghouse to Rust Engineering Company regarding Rust's inquiry), it is stated:

> *In view of the fact that the proposed unit will be the only source of electrical power for the craft and newspaper mill, we direct your attention to several Westinghouse features that contribute to the high realiability of our unit. We urge these features be considered in your evaluation.* (Emphasis Added)

Mr. Sherman, on behalf of Westinghouse, goes on to state in this same letter:

> In addition to these engineering features, we also wish to point out that we have facilities to properly handle this plant site. We have sales, consulting and application, and service engineers located in Phoenix, Arizona. We also have a completely equipped repair shop in Phoenix.

It should also be noted by the Court that Westinghouse, as Armco, in *Armco Steel Corp. v. Ford Construction Co., supra,* in the same

breath in which it informed Southwest of the high reliability of their unit and that it would be the only source of electrical power for their craft and newspaper mill, on the back of page 1 of that letter, in small and unintelligible type, attempts to disclaim all liability with regard to "... the high reliability of our unit" provided to Southwest by stating:

> Westinghouse, in connection with apparatus sold hereunder, agrees to correct any defect or defects in workmanship or material which may develop under proper or normal use during the period of one year from the date of shipment by repair or by replacement f.o.b. factory of the defective part or parts, and such corrections shall constitute a fulfillment of all Westinghouse liabilities in respect to said apparatus, unless otherwise stated hereunder. Westinghouse shall not be liable for consequential damages.

Southwest would submit that the unconscionable exculpatory clause of Westinghouse is nothing more than an artful way to disclaim express and implied warranties. Can it be said, as a matter of law, that whatever Westinghouse giveth they can taketh away by their unconscionable exculpatory clause?

Article 2, §2-316 of the *Uniform Commercial Code* provides the appropriate method and procedure by which a person can exclude or modify the implied warranty of merchantability and the implied warranty of fitness. The appropriate provisions are found in subsections 2 and 3, which state:

> (2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that 'There are no warranties which extend beyond the description on the face hereof.'
>
> (3) Notwithstanding subsection (2)
>
> (a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like 'as is,' 'with all

> faults' or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and
>
> (b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and
>
> (c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

The official comments to §2-316 state that there is no prior uniform statutory provision and Comments 3 and 4 state the strict requirements that must be complied with if the seller is to exclude the implied warranties of merchantability and fitness by stating:

> 3. Disclaimer of the implied warranty of merchantability is permitted under subsection (2), but with the safeguard that such disclaimers must mention merchantability and in case of a writing must be conspicuous.
>
> 4. Unlike the implied warranty of merchantability, implied warranties of fitness for a particular purpose may be excluded by general language, but only if it is in writing and conspicuous.

In the case of *Boeing Aircraft Company v. O'Malley,* 329 F.2d 585 (8th Cir. 1964), Boeing appealed from a judgment entered against it based upon a breach of the implied warranty of fitness. Boeing contracted to sell a helicopter, and the contract of sale provided the following disclaimer:

> (b) The foregoing warranty is given and accepted in lieu of any and all warranties, expressed or implied, rising out of the sale of the helicopter. (329 F.2d at 588)

The United States Court of Appeals for the 8th Circuit, applying Pennsylvania law, held as a matter of law, that the attempted disclaimer of implied warranties by Boeing was ineffective because

implied warranties must be disclaimed by the most precise terms and the disclaimer must be so clear, definite and specific as to leave no doubt as to the intent of the contracting parties.

Although the *Boeing* case, *supra,* was decided under the *1954 Pennsylvania Uniform Commercial Code,* the requirements for disclaiming like warranties under Pennsylvania's present *Uniform Commercial Code* has not materially changed in its effect.

A Pennsylvania case involving the replacement of defective parts, decided under the *Uniform Sales Act,* is the case of *Jarnot v. Ford Motor Company,* 191 Pa.Super. 422, 156 A.2d 568 (1959). In the *Jarnot* case, the plaintiff, a truck owner, brought an action against the distributor and manufacturer for damages allegedly caused by a defect in a new truck. The plaintiff received judgment, and the manufacturer appealed, such appeal being affirmed.

The facts show that the plaintiff purchased a Ford tractor and cab for $4,973 and that within 90 days the tractor was destroyed when an essential part of the steering mechanism, a king pin, had broken. The trailer could not be repaired and it cost $1,700 to repair the tractor. Plaintiff was awarded $4,800 for the value of the trailer when destroyed, plus the cost of repairing the tractor. The contract of sale contained the following attempted disclaimer by Ford, which stated:

> The Ford Motor Company warrants all such parts of new automobiles, trucks and chassis, except for tires, for a period of ninety (90) days from the date of original delivery to the purchaser for each new vehicle or before such vehicle has been driven 4,000 miles, whichever event shall first occur, as shall, under normal use and service, appear to it to have been defective in workmanship or material. This warranty shall be limited to shipment to the purchaser without charge except for transportation, of the part or parts intended to replace those acknowledged by the Ford Motor Company to be defective. The Ford Motor Company cannot however, and does not accept any responsibility in connection with any of its automobiles, trucks, or chassis when they have been altered outside of its own factory or branch plant. (156 A.2d at 571)

The Court noted that the warranty applied exclusively to the replacement of a defective part; however, the Court held that this had no bearing on the question of liability of Ford Motor Company where the failure of a defective part resulted in damage covered by another and distinct implied warranty of merchantability and fitness for the intended use of the vehicle.

The Pennsylvania Courts have also consistently held that an implied sales warranty arises independently and outside of the contract of sale and is imposed by operation of law, and that a provision in a written contract of sale, stating that it contains all agreements between the parties, does not preclude an implied warranty. See *Frigidinners v. Brachton Gun Club,* 176 Pa.Super. 643, 109 A.2d 202 (1954; *Jarnot v. Ford Motor Company, supra.*

The requirements of subsection (2) of §2-316 also require that any attempt to exclude or modify an implied warranty must be conspicuous and, the Courts have held in interpreting the *Uniform Commercial Code,* that when a disclaimer of implied warranty is not conspicuous, then an issue of fact is raised to determine whether or not the attempted disclaimer was effective.

In the case of *Minkes v. Admiral Corporation,* 48 Misc.2d 1012, 266 N.Y. Sup.2d 461 (1966) the purchaser brought an action against the defendant for alleged breach of contract relating to implied warranties. The plaintiff alleged that the refrigerator purchased did not comply with the implied warranties of merchantability and fitness as set forth in the *U.C.C.* The defendant contended that §2-316 permitted a disclaimer of implied warranties and exhibited the "Purchase Order" to show that such had been disclaimed. In the *Minkes* case, as in the case at bar, the prelude to the disclaimer was in large type and the disclaimer was in 5-point and smaller type than the rest of the purchase order. The Court held that the burden of preparing an effective disclaimer was heavy, and that it was one of the hazards of business, stating that before a merchant could disclaim an implied warranty, it must be shown that the customer was clearly placed on notice. The Court, in dismissing

defendant's motion for summary judgment held that since the disclaimer was in smaller type than the rest of the purchase order, it was not conspicuous, and as such, an issue of fact remained to be determined at the trial of the matter.

Southwest's concern about Westinghouse' artful disclaimer of warranties by its unconscionable exculpatory clause is fortified by the authors of 3 Bender's *Uniform Commercial Code Service* §7.03(2), p. 4-46, wherein they state, in Footnote 30:

> On the other hand (and there always seems to be another hand), Comment 3 to Section 2-719 states: 'The seller in all cases is free to disclaim warranties in the manner provided in Section 2-316.' Comment 2 to §2-316 states:
>
> > 'This Article treats the limitation or avoidance of consequential damages as a matter of limiting remedies for breach, separate from the matter of creation of liability under a warranty. If no warranty exists, there is of course no problem of limiting remedies for breach of warranty. Under subsection (4) the question of limitation of remedy is governed by the sections referred to rather than by this section.'
>
> So speak the Comments for whatever help they may be. It is still difficult to perceive how a limitation clause can be unconscionable and a disclaimer clause conscionable in the same situation. The Comments seem to say that a seller may not exclude consequential damages but he may, effectively, exclude all liability by a disclaimer provision, including liability for consequential damages. *If this is the reading to be given Sections 2-316, 2-719, and 2-302, it is submitted that the Code does not make much sense.*

Therefore, it is respectfully submitted that, in the case at bar, Westinghouse, assuming arguendo that its unconscionability clause applies, has not effectively disclaimed liability for breach of the applied warranty of merchantability and the implied warranty of fitness. If the *UCC* is to say that a seller must do certain things in a precise manner to disclaim the implied warranties of fitness and merchantability, then it is respectfully submitted that the same type of disclosure and precision should be required when a seller,

although granting express and implied warranties, seeks to restrict any obligation or liability from a breach thereof by an exculpatory disclaimer, as in the case at bar. Are not the remedies granted to a buyer just as important to the buyer as the implied warranties of fitness and merchantability? The answer to this question must be in the affirmative, for if it were not, then why should any seller at any time attempt to disclaim or limit the implied warranties when he can effectively do so merely by exculpating himself from damages or by merely restricing the buyer's remedies.

CONCLUSION

For the reasons and under the authorities set forth at length hereinbefore, it is respectfull submitted that the lower Court improperly granted the Appellee's Motion for Summary Judgment under the circumstances of this case.

Respectfully submitted,

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Attorneys for Appellant

CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Richard E. Mitchell

(Appendices Follow)

APPENDIX NO. ONE

Exhibit Number	Description	— Appeal Transcript Page Number — Identified	Offered	Received
A	Plaintiff's Exhibit No. 1			
B	Defendant's Exhibit No. Y-2	195	197	198
C	Defendant's Exhibit No. EEE	181	181	182
D	Defendant's Exhibit No. Y-1	194	197	197
E	Defendant's Exhibit No. KKK	179	180	180
F	Defendant's Exhibit No. Y-3	200	203	203
G	Plaintiff's Exhibit No. 2-A			
H	Defendant's Exhibit No. XXX	186	217	217

APPENDIX NO. TWO

Exhibit Number	Description	Record Page Number
A	Reply to Counterclaim	18-19
B	Amended Complaint	777-785
C	Answer to Amended Complaint	746-750
D	Amendment of Complaint—July 29, 1967	880-882
E	Amended Answer and Counterclaim to Plaintiff's Amended Complaint Filed August 7, 1967	887-892
F	Opinion	978-1007
G	Order and Judgment (Partial Summary Judgment)	1008-1011
H	Argument of Counsel	(Appeal Transcript: pp. 236-274)

Appendix I

[Conformed Copy]

ENGINEERING AND CONSTRUCTION CONTRACT

This Contract made and entered into as of May 17, 1960, by and between Southwest Forest Industries, Inc., a corporation organized under the laws of the State of Nevada and having its principal office in Phoenix, Arizona (hereinafter called "Southwest"), and The Rust Engineering Company, a corporation organized under the laws of the State of Delaware and having its principal office in Pittsburgh, Pennsylvania (hereinafter called "Contractor"), in consideration of the mutual covenants and conditions hereinafter contained,

Witnesseth:

Whereas, Southwest proposes to build on its site approximately 15 miles west of Snowflake, Arizona, a Pulp and Paper Mill and related facilities with an average annual production capacity (based on 358 operating days) of 65,000 tons of kraft products, in the proportion of 53,000 tons of linerboard and 12,000 tons of 40# multiwall bag paper, and 75,000 tons of standard white newsprint paper, each of merchantable quality (said Pulp and Paper Mill and related facilities as described under "Scope of Work" hereinafter called the "Project"); and

Whereas, Southwest desires to employ, and to enter into a contract with Contractor to design, to furnish the materials, machinery and equipment for, and to install, erect and construct, the Project, on a Cost-Plus-a Fixed-Fee, guaranteed-maximum Price (including provisions for participation in savings) basis in accordance with the terms and conditions hereof.

Now, Therefore, in consideration of the mutual covenants hereinafter contained, the parties hereto mutually agree as follows:

ARTICLE I — SCOPE OF WORK

A. General Description of Project

The Project is generally described as follows:

> A kraft and newsprint mill to be constructed on a site approximately 15 miles west of Snowflake, Arizona, which mill, together with all appurtenant and related facilities, shall be designed to have an average annual production capacity (based on 358 operating days) of, and which will be capable of sustained production of, 65,000 tons of kraft products, in the proportion of 53,000 tons of linerboard and 12,000 tons of 40# multiwall bag paper, and 75,000 tons of standard white newsprint, each of merchantable quality, utilizing one kraft pulp plant and fourdrinier paper machine for production of kraft products and one groundwood plant and fourdrinier paper machine for production of the newsprint, respectively.
>
> The mill will include adequate storage and preparation facilities for roundwood and chips, chemicals and other raw materials; buildings and equipment for paper, board and newsprint manufacture; a water well field located approximately 11 miles from the mill site; an underground water line extending from the well field to the mill site; an effluent disposal ditch and disposal area; and other components and appurtenances as required for the complete mill.

The Project and the buildings, facilities, machinery and equipment comprising the same and to be constructed, installed and furnished are described and defined in greater detail in the following documents, which documents have been submitted to Southwest and have been marked for identification by both parties and are attached hereto and fully incorporated herein:

1. Appendix "A" to Proposal No. E-18257 containing Outline Specifications, Equipment List and Data and Drawings, dated November 18, 1959, Revised May 17, 1960.

2. Appendix "B" to Proposal No. E-18257 containing Flow Diagrams and Layout Drawings, dated November 18, 1959, Revised May 17, 1960.
3. Appendix "C" to Proposal No. E-18257 containing General Description of New Kraft Board and Newsprint Mill dated November 18, 1959, Revised April 5, 1960.
4. Appendix "D" to Proposal No. E-18257 containing Design and Construction Standards.

It is understood, however, that the specifications, equipment list, data, diagrams, drawings, descriptions and construction standards contained in and specified by such Appendices shall not be a limitation upon the requirements of Article VIII hereof.

B. ENGINEERING

Contractor shall design the Project and shall furnish all engineering services required in connection with, and shall perform, each of the following:

1. Preparing detailed engineering plans and working drawings for all phases of the Project as may be necessary for construction, completion, and efficient operation of the Project; reviewing and approving manufacturers' drawings; and doing any and all other engineering required in connection therewith.
2. Preparing detailed engineering specifications for equipment and materials, including standards of workmanship and other instructions as may be necessary, and preparing bills of material.
3. Analyzing technical aspects of proposals of manufacturers and vendors for furnishing various items of materials and equipment, and making technical selections as to purchase (after consultation with SOUTHWEST in respect of major items).
4. Selecting the type and character of materials and equipment required.
5. Preparing a detailed estimate of the cost of the Project.
6. Assisting, upon SOUTHWEST's request, in obtaining approvals and licenses as may be required by governmental agencies.

Contractor will furnish SOUTHWEST during the progress of the work with necessary copies of all completed Contractor and vendor drawings and, upon completion of the Project, will deliver to SOUTHWEST the originals of all drawings.

C. PURCHASING, INSPECTION AND EXPEDITING

Contractor will furnish all necessary services required for the purchase of all materials and equipment and for the inspection and expediting of such materials and equipment, such services to include generally the following:

1. Preparing inquiries, soliciting quotations from lists of vendors and analyzing commercial terms of vendors' proposals.
2. Preparing and issuing the purchase orders and necessary supplements thereto (after consultation with SOUTHWEST in respect of major items), provided no item of foreign manufacture will be purchased without prior approval of SOUTHWEST.
3. Providing engineering inspection of materials and equipment, and witnessing manufacturers' tests before shipment, to the extent deemed necessary.
4. Expediting manufacturers' engineering and the transmittal of manufacturers' shop drawings to accommodate design requirements.
5. Expediting shop production of materials and equipment.
6. Issuing periodic reports to SOUTHWEST on the production status of materials and equipment.

7. Routing and classifying shipments to obtain minimum freight rates and most direct routes.

8. Tracing and expediting shipments to destination.

9. Filing freight claims with carriers for overcharges, losses or damages, if any, and preparing applications to the carriers or to regulatory authorities, if necessary, for rate adjustments.

10. Auditing invoices and otherwise endeavoring to secure fulfillment of purchase order contracts in accordance with the conditions thereof.

Contractor shall schedule and handle all purchases so as to take advantage of all available cash and trade discounts, rebates and refunds and all such discounts, rebates and refunds and all proceeds from the sale of surplus materials shall be credited to the "Cost of the Work" (as hereinafter defined).

Contractor covenants and agrees to conduct its purchasing program and work in connection with the Project so as to obtain benefit from manufacturer's warranties with respect to, and guarantees of the performance of, machinery, equipment and other apparatus and facilities to be a part of the Project and to pass to SOUTHWEST, as soon as possible, all such manufacturer's warranties and guarantees.

D. CONSTRUCTION

Contractor shall plan, organize, supervise and direct construction of the Project and shall furnish all labor, material, process equipment, tools, construction equipment and supervision necessary to construct and complete, and shall construct and fully complete, the Project in a workmanlike manner in accordance with this Contract and Contractor's prints, working drawings, equipment lists and specifications and good engineering practices and accepted construction procedures.

The construction work to be performed hereunder shall be carried out in accordance with the schedule for starting and completing the principal sections of the construction work and Contractor shall coordinate its engineering and purchasing functions with such Construction Schedule. A tentative construction schedule, indicating the number of months required after start of work to complete each part of the Project, accompanies this Contract; a detailed approved Construction Schedule will be mutually agreed upon and become a part of this Contract when vendors' certified arrangement and fabrication drawings have been approved and firm delivery dates of equipment have been established.

E. WATER WELLS AND SUPPLY

Contractor shall drill and equip four (4) wells designed to produce 8,000,000 gallons of water in a twenty-four hour period, said wells to be drilled and developed in reliance upon and in accordance with recommendations contained in W. F. Guyton and Associates' report on ground water conditions, dated December 29, 1956, and subsequent letter, dated October 7, 1959, copies of both of which have been delivered to Contractor, and "Specifications for Snowflake Wells", prepared by W. F. Guyton and Associates under date of March 14, 1960, Revised April 1, 1960, contained in Appendix "A" to Proposal No. E-18257 referred to in subparagraph 1 of paragraph A of Article I hereof.

Contractor shall also design or designate the placement of, and install, all facilities and apparatus (including the main water pipeline, water service lines, pumps and valves and fittings) requisite to the transportation of such water to the mill site and its proper utilization and distribution therein and thereupon so as to insure proper and efficient use thereof in the Project's manufacturing operations.

In the event further investigation shall result in a decision by SOUTHWEST to move the well field westward, with a view toward reducing the estimated cost of the mill water supply line, any saving developed by so moving the well field will be credited to the guaranteed-maximum cost (as hereinafter defined and discussed) of the Project.

F. Items to Be Furnished by Southwest

Southwest shall arrange for and provide, as and when required by the Construction Schedule, the following:

1. A site upon which to construct the Project and its facilities, as described in Paragraph A of this Article I, including space adjacent to the Project site as required by Contractor for locating construction plant facilities including temporary storage and handling areas and areas for field fabrication and pre-assembly work.
2. Site for the water well field as above described.
3. Right(s)-of-way for the underground water line from the water well field to the mill site.
4. All access roads outside of, and leading up to the fence line of, the mill area.
5. Right(s)-of-way for power and communications lines.
6. Delivery of firm power at 13.8 kv. in an amount of not less than 1000 kw.
7. Sites for the effluent ditch and effluent disposal area.

The cost of the foregoing facilities has been and shall be excluded from the guaranteed-maximum price established and defined in Article VI hereof.

Southwest shall furnish all necessary plant operating supervision and operators, materials, supplies and utilities required for the start-up and initial operating period.

G. Items Which May be Furnished by Southwest

Southwest may from time to time with approval of Contractor purchase and furnish items of material and equipment entering into construction of the Project. In all such instances the guaranteed-maximum price shall be decreased by the cost to Southwest of the items so furnished including transportation and other expenses incurred in delivering the same to the site of the Project.

H. Excluded Items

Contractor shall not be obligated hereunder to furnish any of the following items for plant operation:

1. Spare parts or standby units for equipment to be furnished, except where specified.
2. Fork trucks and automotive trucks.
3. Maintenance materials.
4. Office furniture and equipment.
5. Mill communications systems.
6. First aid equipment.
7. Portable fire extinguishers and hose carts.
8. Mobile yard equipment (other than one Trackmobile).

ARTICLE II — CHANGES IN THE WORK

Southwest may from time to time change the "Scope of Work" by directing Contractor to perform additional work, or may direct the omission of work previously ordered, and the provisions of this Contract shall apply to all such changes, modifications, additions, and omissions. No changes shall be made unless first authorized by a change order in writing signed by authorized representatives of Southwest and Contractor and each such change order shall specify the increase or decrease in the guaranteed-maximum price and in Contractor's fixed fee resulting therefrom.

ARTICLE III — WORKING HOURS

The guaranteed-maximum price hereunder is based upon working a standard forty (40) hour week, five (5) days per week, Monday through Friday, except holidays. If it becomes necessary, with agreement of SOUTHWEST, to work any other shifts of hours or additional hours (except casual overtime), any wage premiums and other extra costs in connection therewith shall increase the guaranteed-maximum price of the Project.

ARTICLE IV — SUBCONTRACTS, PROCEDURE MANUAL AND RECORDS

A. Contractor shall perform the work required hereunder with its own forces but may sublet parts when it is to the best interest of the Contract, but any such subletting, however, shall not relieve Contractor of its obligations hereunder. The specific services to be performed by Contractor, and the controls and approvals to be exercised by SOUTHWEST, shall be itemized in a job procedure manual to be prepared by Contractor and approved by SOUTHWEST.

B. Contractor shall check all material and labor entering into the work and keep such detailed accounts as may be necessary to proper financial management under this Contract, and the system of records and accounting shall be such as is satisfactory to SOUTHWEST or to an auditor appointed by SOUTHWEST. SOUTHWEST shall be afforded access to the work and to all Contractor's records relating to this Contract.

ARTICLE V — COST OF THE WORK

A. The "Cost of the Work" for which Contractor shall be reimbursed (subject to the limitations contained in Article VI hereof) shall consist of all costs, expenses, and losses not compensated by insurance, incurred by Contractor in the performance of the work hereunder (except those items specified in paragraph B of this Article V) and shall include, but not be limited to, the following items:

1. Salaries, payroll taxes and insurance, general holidays, regular vacation and other reasonable and customary allowances of Contractor's project manager and his assistants, project engineer, engineers, designers, draftsmen, estimators, and any other engineering department employees, while and to the extent engaged in the prosecution of the work at the principal or any branch office of Contractor.

2. All wages paid to workmen and foremen and all social security and payroll taxes, subsistence and travel allowances and travel time, pension fund payments, and other monies required to be paid the workmen or collected for their benefit by virtue of established custom or agreement, or as may be found necessary in order to maintain an adequate labor force.

3. Salaries, regular vacation and other reasonable and customary allowances of Contractor's employees stationed at the field office in whatever capacity employed, and of employees while engaged in the home office, at shops or on the road in expediting the production or transportation of material.

4. All expenses incurred for the transportation of the supervisory force required to the site of the work as the construction begins and from the site at the end of the job.

5. Reasonable transportation, traveling, hotel and living expenses of Contractor's officers or supervisory employees necessarily incurred in the discharge of duties connected with the work while away from home base.

6. Cost of all materials, supplies, and transportation thereof, including all temporary structures and facilities and their maintenance.

7. Cost of construction supplies and all tools not owned by workmen.

8. Rentals of all construction equipment and plant or parts thereof (other than any such as shall be furnished by SOUTHWEST without charge therefor pursuant to the provisions of paragraph C of this Article V) whether rented from Contractor or others, at rates approved by SOUTHWEST; transportation of said construction equipment and plant or parts thereof; cost of loading and unloading; cost of installation; dismantling, and removal thereof; and minor repairs and replacements during its use on the work.

9. The total cost of all subcontracts let by Contractor to others in the performance of the work, including the fees paid to subcontractors working on a cost-plus-a-fee basis, except the fees, if any, paid to subcontractors which are subsidiaries or affiliates of Contractor.

10. Premiums on all bonds (other than the performance bond provided for in paragraph D of Article IX) and insurance policies.

11. Miscellaneous expenses, such as telegrams, telephone service, blueprints, expressage, and other petty cash items.

12. Any tax now or hereafter imposed by a Federal, State, Municipal or other government agency, based on or measured by the sale or use of the material, equipment, or services, covered hereby or by the gross receipts from this transaction or any allocated portion thereof, or by the gross value of the material, equipment services, or payroll covered hereby, or any similar tax.

13. Permit fees, royalties, damages for infringement of patents and cost of defending suits therefor.

It is understood and agreed that the amount charged to the "Cost of Work" hereunder pursuant to the provisions of subparagraphs 1, 2, 3 or 5 above, shall be, in each case, proportional to the total work time of any such personnel expended upon work hereunder during the appropriate period.

B. Contractor shall not be reimbursed for the following:

1. Salaries, overhead, or general expenses of any kind in the home office or in any regularly established branch office of Contractor except as these may be expressly included in paragraph A of this Article V, or as may be specifically authorized by SOUTHWEST.

2. Interest on capital employed.

3. Fixed fees, if any, paid to subcontractors which are subsidiaries or affiliates of Contractor.

C. Contractor shall prepare and submit to SOUTHWEST, as promptly after the date hereof as may be practicable, a list of anticipated requirements of construction equipment and plant or parts thereof and SOUTHWEST may at its election furnish all or any portion thereof. If SOUTHWEST shall elect to furnish any of such construction equipment and plant or parts, then either a reasonable rental shall be paid to SOUTHWEST therefor (without adjustment of the guaranteed-maximum price) or if Southwest shall elect to charge no rental therefor, then the guaranteed-maximum price shall be decreased by a mutually acceptable amount. Any such items so furnished by SOUTHWEST shall be placed at disposal of Contractor at such time or times as shall not result in a delay of, or hindrance to, Contractor's Construction Schedule. All tools, equipment, materials, supplies, structures, facilities, plants and other items purchased and charged to "Cost of the Work", which are not incorporated into or consumed in construction of the Project shall be valued by the Contractor upon completion of the Project and credited to the "Cost of the Work" or SOUTHWEST shall have the right to purchase any such item at the designated value in which event the proceeds of such sale shall be credited to the "Cost of the Work."

ARTICLE VI — PRICE

A. Subject to the further provisions of this Article VI, SOUTHWEST shall reimburse Contractor for the cost of the work as defined in Article V "Cost of the Work" and, in addition, shall pay Contractor a fixed fee of One Million Five Hundred Thousand Dollars ($1,500,000).

B. In no event shall the "Cost of the Work" to SOUTHWEST plus the fixed fee exceed the guaranteed-maximum price of Thirty-Two Million Three Hundred Thirty-Four Thousand Five Hundred Dollars ($32,334,500) hereby established subject to the following adjustments:

1. If the "Scope of Work" is changed pursuant to Article II hereof, the guaranteed-maximum price shall be increased or decreased by the amount of the algebraic sum of the amounts specified in all such change orders.
2. If the actual cost of items specifically provided for, and listed as, machine shop equipment and laboratory furniture and equipment shall be more or less than $244,326, the guaranteed-maximum price shall be increased or decreased, as the case may be, by the difference between the actual cost and $244,326.
3. If SOUTHWEST shall furnish items without charge therefor pursuant to paragraph C of Article V hereof, the guaranteed-maximum price shall be decreased by the agreed amount.
4. If the location of the well field is moved pursuant to the provisions of paragraph D of Article I, the guaranteed-maximum price shall be decreased by the agreed amount.
5. If Contractor is required to pay wage premiums or incur other extra costs for additional or unusual hours of work, pursuant to the provisions of Article III, the guaranteed-maximum price shall be increased by the aggregate amount of such additional cost.
6. If Southwest shall furnish items of materials and equipment pursuant to the provisions of paragraph G of Article I hereof, the guaranteed-maximum price shall be decreased by the amount specified in said paragraph G.

Should the sum of the "Cost of the Work" plus the fixed fee be less than the guaranteed-maximum price, if and as adjusted, SOUTHWEST shall pay 25% of the saving to Contractor as additional compensation.

ARTICLE VII — PAYMENT

SOUTHWEST shall, subject to the other provisions of this Contract, advance to Contractor sufficient funds to enable Contractor to pay all costs incurred hereunder, including fee earned. Such funds shall be deposited in a special account by or for Contractor with Morgan Guaranty Trust Company of New York and shall be handled and disbursed by Contractor in such manner as to keep the management of such funds wholly apart and separate from other funds of Contractor. Advancement of, and accounting for, such funds shall be accomplished as follows:

A. On or before the fifteenth day of each month, Contractor shall submit to SOUTHWEST for approval an estimate in reasonable detail, of the "Cost of the Work" for the succeeding month (the Monthly Estimate);

B. Within fifteen days following receipt of the Monthly Estimate, SOUTHWEST shall deposit funds in the approved amount thereof (increased or decreased by the Monthly Adjustment, if any, as defined in paragraph C of this Article VII) in Contractor's special account above referred to;

C. Contractor shall deliver to SOUTHWEST together with the Monthly Estimate, a statement showing in detail money expended by it or otherwise due on account of the work during the preceding month including cost of payments made on equipment even though the equipment is not delivered, together with copies of payrolls and copies of bills for material delivered and work done during said period, and also for such proportionate amount of Contractor's fee as has been earned. Such statement shall also set out the total amount of funds theretofore advanced by SOUTHWEST to cover or on account of the total expenditures and fee payment shown therein. The excess or deficiency of such funds theretofore advanced by SOUTHWEST shall constitute the amount of the Monthly Adjustment referred to above in paragraph B of this Article VII.

D. It is distinctly understood and agreed that all provisions contained in this Contract for payment of Contractor's fixed fee are subject to the further provision that from and after the date payments on

account of such fixed fee shall have aggregated $750,000, no further payments on account of fixed fee shall be made, nor shall any amounts thereof be included in subsequent Monthly Estimates, until completion and acceptance of the Project pursuant to the provisions of Article VIII hereof. Upon such completion and acceptance, however, the balance of the fixed fee shall forthwith be paid over and delivered to Contractor.

ARTICLE VIII — COMPLETION AND ACCEPTANCE

The Project shall be completed on or before August 1, 1962, and shall be deemed completed and shall be accepted by SOUTHWEST when each of the following conditions shall have been met:

A. The Project has been placed in good operating condition; and

B. SOUTHWEST has received a report from Ebasco Services Incorporated (or such other independent firm of engineers of recognized standing as SOUTHWEST and Contractor shall agree upon) expressing the opinion of said firm that the Project has been constructed in a workmanlike manner in accordance with this Contract and the plans, drawings, and specifications and good engineering practice and accepted construction procedures, is in good operating condition and is capable of sustained production of the several products in the amounts and of the quality specified under Article I "Scope of the Work", and that the water supply system installed is capable of delivering from the well sources to the mill, water in quantities adequate for such production; and

C. Not less than 1000 tons of standard white newsprint of merchantable quality shall have been produced;

provided, however, such acceptance shall not be withheld if the above conditions are not met by reason of improper operation of the Project by SOUTHWEST personnel, shortages or unsuitability of raw materials, or other causes not attributable to work performed or required to be performed hereunder by Contractor.

ARTICLE IX — INSURANCE AND LIABILITY

A. INSURANCE

Contractor shall, during the performance of this Contract, keep in force the following insurance:

1. Workmen's Compensation Insurance, including Employer's Liability Insurance for its employees;
2. Public Liability Insurance covering bodily injuries with limits of $1,000,000 one person and $1,000,000 one accident, and Property Damage with limits of $1,000,000 per accident;
3. Automobile Liability Insurance covering bodily injury with limits of $1,000,000 one person and $1,000,000 one accident and Property Damage with limits of $1,000,000 per accident; and
4. Fire, lightning and extended coverage peril insurance, plus installation floater coverage on the Project subject to a deductible of $10,000 per loss, and physical damage insurance on its construction equipment subject to $5,000 per loss deductible.

B. SOUTHWEST CO-INSURED

The insurance required under paragraph A above shall be carried with companies acceptable to SOUTHWEST and, to the extent possible, SOUTHWEST will be named as a co-insured as its interest may appear. SOUTHWEST shall be furnished with copies of all such policies.

C. WAIVERS

SOUTHWEST agrees to waive, and does hereby waive, its right of recovery against Contractor and any of its affiliated or associated companies performing any part of this work for any losses including loss of use to its existing plant or other property, except property to be incorporated in the Project, resulting from fire, lightning, explosion or other extended coverage perils, vandalism and malicious mischief.

D. PERFORMANCE BOND

Contractor, forthwith following the execution of this Contract, shall furnish a bond in an amount not less than Ten Million Dollars ($10,000,000) covering Contractor's faithful performance of this Contract and the payment of all Contractor's obligations arising hereunder, in such form as SOUTHWEST may prescribe and with such sureties as SOUTHWEST may approve. The cost of such bond shall be paid and borne by SOUTHWEST.

ARTICLE X — LIENS

No part of the retained fee shall be or become due and payable until the Contractor, both for itself and all subcontractors, if any, shall deliver to SOUTHWEST a complete release of all liens arising out of this Contract, or receipts for all payments in full in lieu thereof and, if required by SOUTHWEST, an affidavit that so far as Contractor has knowledge, information or belief, the releases and receipts include all labor and material for which a lien could be filed. If any lien, however, remain unsatisfied after all payments are made, the Contractor shall refund to SOUTHWEST all moneys that it may be compelled to pay in discharging such lien or liens, including costs of court and a reasonable attorney's fee. SOUTHWEST shall notify Contractor of any claim that a lien is unsatisfied and Contractor shall have the right to participate with SOUTHWEST in resisting any such claim.

ARTICLE XI — PERMITS

All building or other permits required for construction of the Project shall be obtained and paid for by SOUTHWEST.

ARTICLE XII — TITLE TO THE WORK

The title to all work completed and in course of construction and to all materials, on account of which any payment has been made, shall be in SOUTHWEST.

ARTICLE XIII — GOVERNMENTAL REGULATIONS

Contractor's obligations under this Contract are subject to all applicable governmental regulations, priorities, restrictions or orders now or hereafter in force and Contractor shall comply with and observe the same.

ARTICLE XIV — INDEPENDENT CONTRACTOR

In the performance of its work hereunder Contractor shall be, and shall be deemed to be, an independent contractor; SOUTHWEST exercising no control over the details of such work or the manner of performing the same and being interested only in the results obtained.

ARTICLE XV — AUTHORIZED REPRESENTATIVES

SOUTHWEST and Contractor shall each deliver to the other a list in writing of those officers or employees who have been designated by each of them, respectively, to act as authorized representatives for the purposes of this Contract. Limitations of authority of any such authorized representatives may be stated in such listing but unless stated, each designated authorized representative may be relied upon by the other party as possessing full power to bind his principal. Authorized representatives may be removed or added but no such changes shall be binding on the other party until received in writing by it.

ARTICLE XVI — TERMINATION

This Contract shall continue in force until completion of the Project; provided, however, that SOUTHWEST shall have the right, after 30 days' notice to Contractor in writing, to terminate this Contract in the event of complete abandonment of the Project by SOUTHWEST prior to its completion, in which event SOUTHWEST shall make settlement for the cost of the Project, and shall pay Contractor the amounts due hereunder and unpaid as of the effective date of such termination, including any fee earned but unpaid. It is understood that Contractor's fee shall be not less than the total of the monthly installments

hereof paid and due hereunder at date of such termination, including that installment due for the month during which termination occurs, plus all retentions, if any.

ARTICLE XVII—FORCE MAJEURE

In the event the progress of the work shall be delayed for a period or periods aggregating more than 15 days by reason of force majeure, the completion date of August 1, 1962 specified in Article VIII hereof shall be extended by such period of time that the progress of the work shall be so delayed in excess of 15 days; provided, however, that in no event shall such completion date of August 1, 1962 be extended beyond February 1, 1963 except by reason of Acts of God, fire, explosion, flood, civil disturbances, acts of the public enemy, wars, strikes of suppliers of items of major equipment or government orders or regulations. No such extension shall be made for any delay occurring more than seven days before claim therefor is made in writing by Contractor to SOUTHWEST. As used herein the term "force majeure" shall mean Acts of God, strikes, lockouts, boycotts, combinations of workmen, fire, explosion, flood, civil disturbances, acts of the public enemy, wars or any other contingency or cause which is beyond the control of Contractor whether or not of the kind hereinabove specified. Any event of force majeure shall in so far as possible be remedied with all reasonable dispatch.

ARTICLE XVIII — LIMITATIONS

Notwithstanding anything to the contrary contained herein, it is specifically understood and agreed that prior to the Effective Date under the Bond Purchase Agreements to be entered into between SOUTHWEST and the purchasers of the 6¼% General Mortgage Sinking Fund Bonds which SOUTHWEST proposes to issue, the Contractor shall incur only such costs and expenses and do and perform only such work as shall be specifically authorized in advance by SOUTHWEST in writing and SOUTHWEST shall be liable hereunder only to the extent specified in any such authorization; and in the event said Effective Date shall not occur on or before July 1, 1960, either party hereto may terminate this Contract by notice to the other in writing whereupon each party shall be released and discharged of and from any and all liabilities hereunder except to the extent theretofor incurred in accordance with this Article XVIII.

ARTICLE XIX — NO OTHER AGREEMENTS

There are no agreements or understandings between the parties relating hereto other than those written or specified herein.

IN WITNESS WHEREOF, the parties have respectively caused these presents to be signed by their duly authorized officers, and their corporate seals to be hereunto affixed, as of the day and year first above written.

THE RUST ENGINEERING COMPANY

[SEAL]

By S. M. RUST, JR.
President

ATTEST:

D. C. SHAW III
Secretary

"CONTRACTOR"

SOUTHWEST FOREST INDUSTRIES, INC.

[SEAL]

By J. B. EDENS
President

ATTEST:

HARRY R. JONES
Asst. Secretary

"SOUTHWEST"

Westinghouse

ELECTRIC CORPORATION

May 16, 1960

PHONE EXPRESS 1-2000
300 FOURTH AVENUE
BOX 1017 PITTSBURGH 30 PA

Rust Engineering Company
930 Fort Duquesne Boulevard
Pittsburgh 19, Pennsylvania

Attention: Mr. John W. Ruyak

Gentlemen:

Inquiry E8285-Q-P13
Our Negotiation #50203
South West Forest Industries

In compliance with your specification E-8285-Q-P13 dated May 3, 1960, we enclose six copies of our proposal for a 25,000 KW turbine generator unit.

Subject to Prior Sale @ 12,650 ~~

We are pleased to quote a price of $1,137,000.00 for the equipment covered in our proposal. The equipment can be shipped from our factory in 15 months from the time a firm order with complete information is received. If this delivery does not line up with your requirements, we would appreciate the opportunity of negotiating with you in an effort to meet your needs. Deliveries on large items such as this can change rapidly because of the situation on large castings and forgings. Drawings for approval could be submitted in 90 days after receipt of an order.

Price policy and terms of payment are prescribed on page 6-B of our proposal. Please note that our price is firm for the shipment quoted.

In view of the fact that the proposed unit will be the only source of electrical power for the Kraft and Newsprint Mill, we direct your attention to several Westinghouse features that contribute to the high reliability of our unit. We urge that these features be considered in your evaluation.

Please refer to the Turbine Illustration Section of our proposal.

PDL-1210-3 - Combination Stop and Throttle Valve:

The combination stop and throttle valve is oil operated for protection - the valve cannot be opened without lubricating oil pressure being established. This valve can be used on a cold start-up, this permitting steam to be admitted to all nozzle chambers. This permits uniform heating of the turbine cylinder, thereby minimizing stresses in nozzle partitions on cold start-ups.

PRICES This quotation automatically expires fifteen (15) days from this date and by notice is subject to change within this period

TAXES Prices do not include state or local taxes based on or measured by sales, which tax or taxes will be added to the prices where applicable

PAYMENTS If, in the judgment of Westinghouse, the financial condition of the Purchaser, at any time during the manufacturing period, or at the time apparatus is ready for shipment, does not justify the terms of payment specified, Westinghouse may require full or partial payment in advance

Pro rata payments shall become due as shipments are made. If shipments are delayed by the Purchaser, payments shall become due from date when Westinghouse is prepared to make shipment. If manufacture is delayed by the Purchaser, payment shall be made based on the contract price and percent of completion. Apparatus held for the Purchaser shall be at the risk and expense of the Purchaser.

DELIVERY Unless otherwise stated, delivery will be made f.o.b. point of shipment. Shipping dates are approximate and are based on prompt receipt of all necessary information from the Purchaser.

LOSS, DAMAGE, OR DELAY Westinghouse shall not be liable for loss, damage, detention or delay resulting from causes beyond its reasonable control or caused by fire, strike, civil or military authority, restrictions of the United States Government or any department, branch or representative thereof, insurrection or riot, embargoes, car shortages, wrecks or delays in transportation, or inability to obtain necessary labor, materials, or manufacturing facilities due to such causes. Receipt of the apparatus by the Purchaser upon its delivery shall constitute a waiver of all claims for delay.

WARRANTY Westinghouse, in connection with apparatus sold hereunder, agrees to correct any defect or defects in workmanship or material which may develop under proper or normal use during the period of one year from the date of shipment, by repair or by replacement f.o.b. factory of the defective part or parts, and such correction shall constitute a fulfillment of all Westinghouse liabilities in respect to said apparatus, unless otherwise stated hereunder. Westinghouse shall not be liable for consequential damages.

PATENTS Westinghouse shall defend any suits or proceedings brought against the Purchaser so far as based on a claim that any apparatus sold hereunder, or any part thereof, constitutes an infringement of any patent of the United States, other than a claim covering a process or a product thereof, if notified promptly in writing and given authority, information and assistance (at Westinghouse expense) for the defense of same, and Westinghouse shall pay all damages and costs awarded therein against the Purchaser, provided that this agreement shall not extend to any infringement based upon the manufacture, use or sale of any of said apparatus or any part or parts thereof in combination with apparatus or things not furnished hereunder. In case the apparatus or any part thereof furnished hereunder is in such suit held to constitute infringement and its use is enjoined, Westinghouse shall, at its own expense, either procure for the Purchaser the right to continue using said apparatus or part thereof; or, replace same with non-infringing apparatus; or modify it so it becomes non-infringing; or remove said apparatus and refund the purchase price and the transportation and installation costs thereof. The foregoing states the entire liability of Westinghouse with respect to patent infringement by said apparatus or any part thereof.

TITLE The title to the apparatus sold as herein specified shall not pass from Westinghouse and shall remain personal property until fully paid for in cash, and the Purchaser agrees to perform all acts which may be necessary to perfect and assure retention of title to the said apparatus in Westinghouse. The Purchaser shall assume all risk of loss after the apparatus is delivered.

CANCELLATION Any order or contract may be cancelled by the Purchaser only upon payment of reasonable charges based upon expenses already incurred and commitments made by Westinghouse.

CONTAINERS Additional charge will be made for returnable containers and special devices (such as oil barrels, reels, tarpaulins, coil tube or clamps, etc.) which are used for transportation purposes only. Refund of deposit will be made if returned in good condition to the location designated by the Corporation:

Reels: Within twelve (12) months from date of original shipment by freight collect.

Oil Barrels and Other Special Devices: Within ninety (90) days from date of original shipment by freight prepaid.

ORDERS—On orders placed with Westinghouse in accordance with this quotation the above conditions shall take precedence over any printed conditions that may appear on your standard order form.

PDL-1230-21 - Steam Chest:

We are offering our new inserted steam chest on this unit. The inserted type construction permits casting a configuration to give flexibility between groups of nozzle chambers and between nozzle chamber arch and turbine cylinder flanges. Bearing in mind that the unit will be subjected to frequent and relatively large swings in load, we are offering a steam chest with enough freedom of expansion to prevent excessive stresses due to thermal expansion and contraction during load swings.

PDL-1230-16 - Solid Turbine Rotor:

Our turbine rotor is machined from a solid forging. Please note the absence of shrunk and keyed disc. Both turbine and generator rotors are factory balanced. Both are overspeed tested at the factory 20% over rated speed.

PDL-1230-19 - Diaphragm Mountings:

Groups of diaphragms are mounted in separate rings. Special mountings permit the diaphragm rings to expand independent of the turbine cylinders.

PDL-1250-52 - Fully Hydraulic Control System:

We are offering our fully hydraulic governing system. The system is fundamentally simple and inherently flexible for adaptation to a double automatic extraction control system. The governing speed signal is taken directly from the shaft by variation in pressures from the governor oil impellor. For maximum reliability, every effort has been made to eliminate the application of gears, cams, intricate mechanical assemblies, and complex "mechanical" linkage.

PDL-1210-16 - Sliding Type Front Pedestal:

We offer a heavy duty type front pedestal which permits thermal expansion of the turbine cylinder by sliding on lubricated surfaces. For a unit of this size and operating conditions, we offer this type of pedestal support rather than a pedestal supported by flexible I-beams.

PDL-1210-19 - Bearings:

The unit will be equipped with a double Kingsbury type pivoted-shoe thrust bearing. The operation of the thrust bearing depends upon a thin wedge-shaped load carrying oil film between the collar and the shoes of the thrust bearing. The exact shape of the oil film is a function of such variables as shaft speed, oil viscosity, and thrust loading. If the thrust shoes are permitted to pivot freely, they will adjust to the required oil film shape, thereby making the bearing effective for a wide range of possible variation in conditions.

The features of our hydrogen cooled generator are outlined on PDL-1230-31. We should particularly like to call to your attention PDL-

1250-46, which covers Thermalastic Insulation.

You will find our performance curve (MD-1845) included in the proposal. It is our intent that the flow capabilities of the proposed unit in every way reflects the requirements outlined in the specifications. Supplemental information was received verbally which was incorporated as part of the performance field.

We have sized the primary nozzles to pass the maximum steam flow that the power and recovery boilers are capable of generating.

The exhaust of the turbine is sized to permit carrying 20,000 KW load with zero extraction at both high pressure and low pressure extraction points. This can be done without necessitating building up stage pressures to the point that the low pressure extraction pressure will exceed the rated 60 psig.

The intermediate section of the turbine was sized to pass 275,000 pounds per hour when the high pressure extraction pressure is maintained at 235 psig. This sizing will permit the specified 60 psig. extraction of 150,000 pounds per hour while carrying an electrical load of 25,000 KW.

In addition to these engineering features we also wish to point out that we have the facilities to properly handle this plant site. We have Sales, Consulting and Application, and Service Engineers located in Phoenix, Arizona. We also have a completely equipped repair shop in Phoenix.

Our plant, located in Sunnyvale, California, also has the facilities to manufacture this turbine should any labor trouble persist at our Lester, Pa., Plant.

In accordance with your request we are also attaching to this letter a partial list of installations that we have of units similar to this design and capacity.

We trust we will be given the opportunity to present our story to your people personally, so that we can answer all of your questions, in an effort to make it easier for you to make your evaluation.

Yours very truly,

J. J. Sherman
Sales Engineer

JJS:AWC

PARTIAL LIST OF INSTALLATIONS

Customer	KW Rating	Inlet PSIG	Inlet °F. TT	Extraction HP	Extraction LP	Exhaust PSIG	Exhaust In.HG.	Year Installed	Unit Location
Fraser Paper Co., Ltd.	15,625	1200	950	150	30	-	1.5	1958	Madawaska
Oxford Paper Company	12,500	380	625	60	-	-	1.5	12/55	Rumford
Columbia Southern Chemical	18,750	850	900	70	-	-	2.0	1954	Barberton, Ohio
Youngstown Sheet & Tube	25,000	800	750	200	-	-	2.0	5/58	Indiana Harbor
Bowaters Southern Paper	25,000	850	900	50	-	-	2.0	7/57	Calhoun
Bethlehem Steel Co.	25,000	850	850	260	-	-	2.0	11/51	Franklin Works
Brown & Root (3 Units) Houston, Texas	37,500	1650	1000	700	-	-	2.5	10/58	Ravenna, Italy
Dow Chemical (2 Units)	37,500	1250	825	425	165	25	-	'49 & '52	Midland, Mich.

Dellis Accepted Depo Ex 1 ● Dellis Rejected Depo Ex 6 8-4-67

E 5

Dellis. Clarke Depo Ex 1

CC: N.K.SYCKMILLER
C.D.HARDY
C.E.ROSENBERG
C.A.ERDAY
R.S.WILKIN
H.C.LEATHAM, JR.
FILE

JUNE 6, 1960

WESTINGHOUSE ELECTRIC CORPORATION
306 4TH AVENUE
UNION BANK BUILDING
PITTSBURGH 22, PENNSYLVANIA

ATTENTION: MR. J. J. BERMAN

SUBJECT: SOUTHWEST FOREST INDUSTRIES, INC.
25,000 KW TURBINE-GENERATOR
WESTINGHOUSE PROPOSAL 60383

GENTLEMEN:

IT IS THE INTENTION OF SOUTHWEST FOREST INDUSTRIES, INC., TO SOON AS PRACTICABLY POSSIBLE, TO ISSUE A FORM A ORDER TO COVER THE PURCHASE OF ONE 25,000 KW TURBINE-GENERATOR UNIT, GENERALLY IN ACCORDANCE WITH YOUR ABOVE REFERENCED PROPOSAL.

HOWEVER, IN THE INTERIM, PLEASE ACCEPT THIS LETTER OF INTENT AS YOUR AUTHORIZATION TO PROCEED EXPEDITIOUSLY THIS DATE AS THE CONTRACT DATE FOR DETERMINATION OF DELIVERY FOR THE TURBINE-GENERATOR, WHICH IT IS UNDERSTAND HAD BEEN ESTABLISHED FOR APPROXIMATELY 19½ MONTHS.

VERY TRULY YOURS,

THE RUST ENGINEERING COMPANY

S. D. CLARKE, JR.
PURCHASING AGENT

SDC/MEM

ORDER ACKNOWLEDGMENT

Westinghouse Electric Corporation

1½" use
2% Sales.

REGIONAL OFFICE	PRIORITY RATING	
PGH		
REGIONAL ORDER CORRES.	SALESMAN	SALES. REG.
J RICE	J J [illegible]	41

TERMS	CODES	DATE / REFER TO OUR ORDER
NET WITHIN 30 DAYS LATER	1- T1	6/13/50 GO P3- 83681- T1

F. O. B.	PRT. ALLD.	PRT. PPD.	CHARGE TRANSP. AT	CUSTOMER'S ORDER NO. / DATE
P/S		X		8205- SH 5002 6/8/50

RUST ENGINEERING CO (2P)
930 PORT DUQUESNE BLVD
PITTSBURGH 22, PA.
(REFER TO NOTE 2)
ATTN: [illegible]

SHIP TO
RUST ENGINEERING CO
C/O SOUTHWEST FOREST INDUSTRIES
SNOWFLAKE, ARIZONA

PRICES AUDITED	TAXES AUDITED	TAX CODE AND REG. NO.	GOVERNMENT AGENCY AND CONTRACT NO.
		LATER	

ORIG. BIL TO	DEPT B/B TO	MARK EACH PACKAGE	
NOTE 4	NOTE 4	8205- SH- 5002	

REG. NO.	P. AND S. BY / DATE	HOW TO SHIP AND ROUTE	PREPAID
60805	O JENKINS	BEST WAY	X

REQ. NO. AND WT.	ITEM	QUANTITY	DESCRIPTION
			FINAL PRICED

PRICE POLICY:-

DUPLICATE & SEND COPIES OF ORDER TO:-
1- PURCH J J RICE O/S
1- PURCH JC T SCHNELL
1- PURCH F J LEE SHAMITOCH
1- NEW YORK OFF - A C HOLLAND
1- EAST PGH - 104- J E [illegible] BOLTZ, IND SALES
1- PHOENIX OFFICE- D T [illegible]BERRY
2- LOS ANGELES OFFICE- E 43 - A J CHURCHILL

NOTE-1- WORKS ORDER GIVEN TO G FORTINI SOUTH PHILA MEDIUM TURBINE SALES ON MAY 31, 1950 TO PROCEED WITH OUTLINE DWGS AND LOADING INFORMATION FOR CUSTOMER WITH SHIPMENT REQUIRED BY JULY 15, 1951 OR BEFORE.

NOTE-2- INVOICES (5 COPIES) MUST BE RENDERED AND BILLED TO: SOUTHWEST FOREST INDUSTRIES INC.
PURCHASING DEPT
SNOWFLAKE, ARIZONA

1 XXX
SHEET CONTINUED FINAL

YOUR ORDER HAS BEEN ENTERED AS OUR GENERAL ORDER (GO) NUMBER AS SHOWN ABOVE.
Our Regional Order Correspondent will be better able to serve you if our GO Number is referred to in all communications.
Our shipping promise will be given you as soon as acknowledgment of this order is received from our factory

SEE REVERSE SIDE FOR TERMS AND CONDITIONS

TERMS AND CONDITIONS

The conditions stated below shall take precedence over any conditions which may appear on your standard form, and no provisions or conditions of such cept as expressly stated herein, shall be binding on Westinghouse.

XES: Prices do not include state or local taxes based on or measured , which tax or taxes will be added to the prices where applicable.

YMENTS: If, in the judgment of Westinghouse, the financial con- of the Purchaser, at any time during the manufacturing period, or ime apparatus is ready for shipment, does not justify the terms of specified, Westinghouse may require full or partial payment in

rate payments shall become due as shipments are made. If ship- e delayed by the Purchaser, payments shall become due from date estinghouse is prepared to make shipment. If manufacture is delayed Purchaser, payment shall be made based on the contract price and of completion. Apparatus held for the Purchaser shall be at the expense of the Purchaser.

LIVERY: Unless otherwise stated, delivery will be made f.o.b. point ent. Shipping dates are approximate and are based on prompt re- all necessary information from the Purchaser.

SS, DAMAGE, OR DELAY: Westinghouse shall not be liable for nage, detention or delay resulting from causes beyond its reasonable or caused by fire, strike, civil or military authority, restrictions of the States Government or any department, branch or representative thereof, ion or riot, embargoes, car shortages, wrecks or delays in transpor- or inability to obtain necessary labor, materials, or manufacturing due to such causes. Receipt of the apparatus by the Purchaser delivery shall constitute a waiver of all claims for delay.

ARRANTY: Westinghouse, in connection with apparatus sold here- grees to correct any defect or defects in workmanship or material ay develop under proper or normal use during the period of one m the date of shipment, by repair or by replacement f.o.b. factory defective part or parts, and such correction shall constitute a fulfill- all Westinghouse liabilities in respect to said apparatus, unless other- ted hereunder. Westinghouse shall not be liable for consequential

PATENTS: Westinghouse shall defend any suits or proceedings brought against the Purchaser so far as based on a claim that any apparatus sold hereunder, or any part thereof, constitutes an infringement of any patent of the United States, other than a claim covering a process or a product thereof, if notified promptly in writing and given authority, information and assistance (at Westinghouse expense) for the defense of same, and Westinghouse shall pay all damages and costs awarded therein against the Purchaser, provided that this agreement shall not extend to any infringement based upon the manufacture, use or sale of any of said apparatus or any part or parts thereof in combination with apparatus or things not furnished hereunder. In case the apparatus or any part thereof hereunder is in such suit held to constitute infringement and its use is enjoined, Westinghouse shall, at its own expense, either: procure for the Purchaser the right to continue using said apparatus or part thereof; or, replace same with non-infringing apparatus; or modify it so it becomes non-infringing; or remove said apparatus and refund the purchase price and the transportation and installation costs thereof. The foregoing states the entire liability of Westinghouse with respect to patent infringement by said apparatus or any part thereof.

TITLE: The title to the apparatus sold as herein specified shall not pass from Westinghouse and shall remain personal property until fully paid for in cash, and the Purchaser agrees to perform all acts which may be necessary to perfect and assure retention of title to the said apparatus in Westinghouse. The Purchaser shall assume all risk of loss after the apparatus is delivered.

CANCELLATION: Any order or contract may be cancelled by the Purchaser only upon payment of reasonable charges based upon expenses already incurred and commitments made by Westinghouse.

CONTAINERS: Additional charge will be made for returnable containers and special devices (such as oil barrels, reels, torpaulins, commutator clamps, etc.) which are used for transportation purposes only. Refund of deposit will be made if returned in good condition to the location designated by the Corporation.

REELS: Within twelve (12) months from date of original shipment by freight collect.

OIL BARRELS AND OTHER SPECIAL DEVICES: Within ninety (90) days from date of original shipment by freight prepaid.

ORDER ACKNOWLEDGMENT

Westinghouse Electric Corporation

DATE | REFER TO OUR ORDER

GO P3- 88831- T1

PKG. NO. & WT	ITEM	QUANTITY	IDENTIFICATION AND DESCRIPTION
			NOTE-3- ALL NECESSARY INFORMATION MUST BE AVAILABLE BY JULY 7, 1950 FOR CONTRACT MEETING WITH RUST ENGR CO WHICH WILL ENABLE THEM TO PROCEED WITH THEIR ENGINEERING WORKS
			NOTE-4- COPIES OF S/R & B/L AS FOLLOW: 1- PGH OFF- C/S- J J RICE 2- PGH OFF- F J SIMONITSCH 2- LOS ANGELES- E&S A J CHURCHILL 2- CONSIGNEE W/REQ/L 2- PURCHASER 1- PHOENIX OFFICE- D T QUIGENBERRY
			NOTE-5- ALL ENGINEERING QUESTIONS AND CORRESPONDENCE MUST BE ADDRESSED TO F J SIMONITSCH, PGH OFFICE - E&S DEPT TO EXECUTE WITH COPY TO J J RICE, PGH OFF-, O/S DEPT
			NOTE-6- DRAWING APPROVAL REQUIRED WITH DRAWINGS TO SHOW RETURN ADDRESS AS F J SIMONITSCH, 306 , 8 4TH AVE, P.O. BOX 1017, PGH 30, PA.
			SEND COPIES OF ALL DRAWING FOR APPROVAL TO: 4- MR E J FRITSCHI, EXPEDITING DEPT THE RUST ENGINEERING CO 950 FORT DUQUESNE BLVD PGH 22, PA. 1- NEW YORK OFF- A C HOLLAND - SALES 2- PGH OFF- F J SIMONITCH- E&S T/S PGHOFFICE- JJ RICE O/S
			NOTE-6A AFTER CUSTOMER HAS APPROVED DRAWINGS FINAL COPIES ARE TO BE SENT AS FOLLOW: 8- MR E J FRITSCHI EXPEDITING DEPT THE RUST ENGINEERING CO 950 FORT DUQUESNE BLVD PITTSBURGH 22, PA. 1- PGH OFF- F J SIMONITCH- E&S 2- LOS ANGELES OFF- E &S A J CHURCHILL 1- PHOENIX OFF- D T QUIGENBERRY T/S- PGHOFF- J J RICE-O/S
			NOTE-7- COPIES OF (U) PROPOSAL SHOULD BE SECURED FROM P L O'[illegible] SALES DEPT, SOUTH PHILA WORKS

SHEET CONTINUED XXX FINAL

B

CKNOWLEDGMENT
ON

Westinghouse Electric Corporation

25

DATE

REFER TO OUR ORDER

GO'G- 86081- T1

WT.	ITEM	QUANTITY	IDENTIFICATION AND DESCRIPTION
	1	1	25,000 KW TURBINE GENERATOR PER (W) PROPOSAL DATED MAY 12, 1950 PREPARED FOR THE RUST ENGINEERING CO FOR SOUTHWEST FOREST INDUSTRIES INC.
	2	13	COPIES OF INSTRUCTION BOOKS (INCLUDING RENEWAL PARTS DATA) 8- MR E J FRITSCH ,EXPEDITING DEPT THE RUST ENGINEERING CO 930 FORT DUQUESNE BLVD PGH 22, PA 1- PGHOFF- E &S F J SIMONITSCH 3- LOS ANGELES OFF- E&S A J CHRUCHILL 1- PHOENIX OFF- D T QUISENBERRY T/3 PGHOFF- JJ RICE O/B
	2		INSTALLATION SERVICE (PAGES "4B-" AND "5B" OF PROPOSAL

SHEET 3 CONTINUED FINAL A3

(KKK) Deft's Dep Ex [illegible]
8-4-67

APPOINTMENT OF AGENT

SOUTHWEST FOREST INDUSTRIES, INC., a Nevada corporation, herein called Southwest, hereby appoints James A. Staley of Pittsburgh, Pennsylvania, as its agent for the sole purpose of signing purchase orders to be issued in its name in connection with the construction of a pulp and paper mill and related facilities near Snowflake, Arizona. Specifically, the authority hereby granted is limited to the signing of purchase orders issued pursuant to Section "C" of Article I of an engineering and construction contract between Southwest and The Rust Engineering Company, dated May 17, 1960, which contract is made part hereof by reference.

It is understood that purchase orders signed by James A. Staley within the scope of the authority herein granted shall be binding only upon Southwest and the Vendor and shall in no way be binding upon or obligate The Rust Engineering Company,

The authority hereby granted by Southwest to James A. Staley may be revoked by Southwest at any time by an appropriate notice of revocation in writing. The exercise of the right of revocation hereby reserved to Southwest shall

in no way affect the validity of purchase orders signed by James A. Staley prior to the receipt by him of written notice of revocation.

On purchase orders issued hereunder, James A. Staley shall use the title "Agent". It will not be necessary to make any further reference on the purchase order to this agency agreement.

SOUTHWEST FOREST INDUSTRIES, INC.

By _____

Dated June 14, 1960

I hereby accept the above appointment as Agent.

_____
JAMES A. STALEY

Dated June , 1960

E-8235-SM-5002
July 6, 1960
Steamhill-5
Southwest Power Ind
E-8235

JWM:EB

19-1/2 Mo. from date of
letter of Intent (6/6/60)
Rail Freight

TO: [illegible] 7-0-[illegible] - [illegible] - Group [illegible] - Area 7

One (1) 45,000 [illegible] Ingersoll Double Cylinder Self Contained Condensing [illegible] Unit, complete and in accordance with the Rock Island [illegible], Company Specification EQ-6 and Worthington Worldwide Corporation proposal dated July 15, 1960, entitled, Installation consisting specified on Pages 4-B and 5-B. Pull [illegible] of Turbo-Compressor Unit shall include the following: 1-25,000 KW generator, [illegible], single case, single flow, [illegible] condensing Centrifugal [illegible] to be designed for steam at the throttle of 1510 psig, 850° F., [illegible] extraction of up to 350,000 lbs. per hour at 250 psig, [illegible] extraction of up to 150,000 lbs. per hour at 60 psig and exhausting at 2.0" Hg.Abs. 1-22,000 KVA .85 P.F., 27,000 KW, at 30 psig hydrogen pressure, 3600 RPM .64,000R, 13,800 volts, 3 phase, 60 cycle, hydrogen cooled generator. 1-125 KW, 250 volt, 3600 RPM, direct connected, self-ventilated, self-excited air-cooled main exciter. Also included shall be ventilation and instrumentation, factory and acceptance tests - All as specified.

NOTE: Equipment is to operate at an elevation of 6,000 feet above sea level. Provisions shall be included to permit satisfactory performance under these conditions.

PRICE OF UNITS AS ABOVE - - - - - $1,109,050.00

(continued on page 2)

Q-P-13

E-8285-SW-5002
July 6, 1960 1

ughouse Electric Corporation JWR:BWS
2

Listed price is firm and not subject to escalation.

Please prepay transportation charges and show as a separate item on invoices.

This purchase is an Interstate Commerce Transaction and is therefore exempt from Sales Tax, and it is not subject to the Arizona Use Tax because the material purchased is not manufactured or stored in a warehouse in Arizona.

Attached hereto and made a part of this purchase order is form titled, "Instructions for Transmittal of Shop Drawings and Data." Please abide by these instructions.

PROGRESS PAYMENTS SCHEDULE:

$284,200.00	with order, upon presentation of invoice
$ 53,230.00	February, 1961
$ 82,000.00	March, 1961
$ 82,000.00	April, 1961
$ 82,000.00	May, 1961
$ 82,000.00	June, 1961
$221,810.00	20% upon shipment
$166,357.50	15%-30 days after shipment
$ 55,452.50	5% upon acceptance or 120 days after shipment

Confirming "Letter of Intent" dated June 6, 1960 to Mr. J. J. Sherman - DO NOT DUPLICATE.

Shipping Point -
Lester, Pennsylvania See Above

James W. Dailey

PURCHASE ORDER

SOUTHW[illegible]T FOREST INDUST[illegible]S, INC.

2-A

PHOENIX, ARIZONA

ORDER NO [illegible]
DATE July 6, [illegible]
REQUISITION [illegible]
JOB [illegible]
CONTRACT [illegible]

IMPORTANT
THE ABOVE ORDER NUMBER MUST BE SHOWN ON ALL SHIPMENTS INVOICES AND CORRESPONDENCE

[illegible]

WHEN TO SHIP [illegible]

SHIP TO: SOUTHWEST FOREST INDUSTRIES, INC.
PULP AND PAPER MILL
SNOWFLAKE, ARIZONA

SHIP VIA [illegible]

This order is subject to the terms and conditions set forth on reverse side hereof.

QUANTITY	ARTICLE	PRICE
	[illegible]	

ORDER NO. [illegible]
Refer all invoices to this order please use this number as a reference.
Order covered subject to conditions outlined in W. E. Corp. form of acceptance.

M

P O B CARS
DELIVERED BY TRUCK

TERMS Cash upon [illegible] 2

IMPORTANT INSTRUCTIONS — FOUR COPIES OF INVOICES TOGETHER WITH ORIGINAL FREIGHT BILL, ORIGINAL BILL OF LADING, AND SHIPPING NOTICES IN DUPLICATE MUST BE RENDERED TO SOUTHWEST FOREST INDUSTRIES, INC., P.O. BOX 500, PHOENIX, ARIZONA

No allowance will be made for packing, cartage or crating unless stated above.
The Purchaser will not accept billing for any material shipped in excess of that called for above without written consent of this office
The materials covered hereby are intended particularly for use on the job indicated above
Shipment and/or delivery by the Vendor of the materials covered hereby with the consent of the Purchaser, shall in all cases constitute an unqualified acceptance of all the terms and conditions of this order by the vendor

ACKNOWLEDGMENT DATE _____

The foregoing order is hereby accepted by the Vendor subject to all the terms and conditions set forth herein.

_____

_____

THIS ORDER IS SUBJECT TO THE FOLLOWING TERMS AND CONDITIONS:

(1) The term "materials" used herein shall be understood to include articles and appliances of every nature and description being purchased hereunder.

(2) The materials to be furnished hereunder shall comply with the plans and specifications furnished to the Vendor by the Purchaser or Engineer. The Vendor warrants the proper quality, character, adequacy, suitability and workability of the materials. The Vendor and the materials furnished hereunder are subject to the approval of the Engineer. The Vendor agrees to indemnify the Purchaser and Engineer against all loss or damage arising from any defect in materials furnished hereunder.

(3) Shipment and delivery of the materials to be furnished hereunder shall be made as hereinbefore provided or as otherwise required by the progress of the work in which the materials are to be used, upon notice from the Purchaser or Engineer; and it is expressly provided that, as to performance on the part of the Vendor, time is and shall be considered of the essence of the contract.

(4) Should the Vendor, for any reason other than some fortuitous event beyond the control and without the fault or neglect of the Vendor, fail to make deliveries as required hereunder to the satisfaction of the Purchaser, or if the materials are not satisfactory to the Engineer, the Purchaser shall be at liberty to purchase the materials elsewhere, and any excess in cost of same over the price herein provided shall be chargeable to and paid by the Vendor on demand. Should any delay on the part of the Vendor (due allowance being made for contingencies provided for herein) occasion loss, damage or expense to the Purchaser or Engineer, the Vendor shall indemnify the Purchaser and Engineer against such loss, damage or expense. If, for any cause, all or any portion of the materials to be furnished hereunder are not delivered at the time or times herein specified, the Purchaser may, at his option, cancel this order as to all or any portion of materials not so delivered.

(5) The Vendor hereby covenants and agrees to indemnify and save harmless the Purchaser and Engineer against any and all claims or suits for infringement of patents or patent rights claimed to cover the Vendor's processes, products, materials, equipment, apparatus or appliances, such indemnity to include all costs and expenses which the Purchaser and Engineer may incur in defending any such actions that may result from the furnishing of any materials hereunder. The Vendor further covenants and agrees to undertake at the Vendor's own expense the defense of any and all such claims or suits.

(6) The Vendor shall not assign, sublet or otherwise dispose of the whole or any part of this order nor shall the Vendor assign any moneys due or to become due hereunder without the previous written consent of the Purchaser. Any attempt by the Vendor to so assign or dispose of any interest herein shall operate as an instant forfeiture and repudiation hereof by the Vendor and the rights of the parties shall be determined in the same manner as though the Vendor had at the time of such attempted assignment or disposal failed in and refused performance hereunder.

(7) The Purchaser agrees to pay to the Vendor, and the Vendor agrees to accept, as full compensation for the materials furnished hereunder the sum herein set forth, and such sum shall be paid in current funds by the Purchaser to the Vendor at the times and under the conditions herein set forth. Before any payment hereunder shall become due, the Purchaser at its option may require and the Vendor thereupon shall furnish satisfactory evidence of the payment of all accounts for labor and materials pertaining to Vendor's performance hereunder; and provided further that before any payment hereunder shall become due the Vendor shall, if required by the Purchaser, procure and furnish to the Purchaser full and complete release of liens from all persons furnishing labor and materials toward the performance hereof or, at the option of the Purchaser, satisfactory surety bond indemnifying the Purchaser against any claims based thereon.

(8) It is understood and agreed that any moneys due from the Purchaser to the Vendor hereunder may, at the option of the Purchaser, be applied by it to the payment of any indebtedness which may be owing by the Vendor to the Purchaser or to any subsidiary, affiliated or associated company of the Purchaser.

(9) It is agreed that no certificate given or payment made on account of this order shall be conclusive evidence of delivery and acceptance of materials hereunder, either wholly or in part, or shall be construed as acceptance of defective or improper materials.

(10) The Purchaser shall have the right to make changes in this order. If such changes affect the price specified herein to the Purchaser, the Vendor shall secure approval in writing of any change in price before proceeding.

(11) The Vendor further agrees that he shall within ten (10) days from date of notice to furnish same, at the option of the Purchaser, provide the Purchaser with a bond in full amount of this order, conditioned for the faithful performance thereof in all its particulars, duly executed with a surety company designated by the Purchaser, as surety, and in form and contents acceptable to the Purchaser; the cost of said bond to be borne by the Purchaser.

(12) All negotiations and agreements prior to the date of this order are merged herein and superseded hereby, there being no agreements or understandings other than those written or specified herein. In the event of conflict between any proposal of Vendor specifically referred to herein and this order, and as to all matters or points not expressly covered by such proposal, the terms and conditions of this order shall govern.

PURCHASE ORDER

SOUTHWEST FOREST INDUSTRIES, INC.

PHOENIX, ARIZONA
JWR:SJA

ORDER NO P-0285-S[illegible]
DATE July 6, 196[illegible]
REQUISITION Steamhill-[illegible]
JOB
CONTRACT

IMPORTANT
THE ABOVE ORDER NUMBER MU[illegible]
BE SHOWN ON ALL SHIPMEN[illegible]
INVOICES AND CORRESPONDEN[illegible]

Westinghouse Electric Corporation

Page 2

WHEN TO SHIP

SHIP TO: SOUTHWEST FOREST INDUSTRIES, INC.
PULP AND PAPER MILL
SNOWFLAKE, ARIZONA

SHIP VIA

This order is subject to the terms and conditions set forth on reverse side hereof.

QUANTITY	ARTICLE	PRICE
	Listed price is firm and not subject to escalation.	
	Please prepay transportation charges and show as separate item on invoices.	
	DRAWING REQUIREMENTS: Please refer to attached "Instructions for Transmittal of Shop Drawings and Data" for details on approval and transmittal drawings; operating, maintenance and installation instructions; spare parts and recommended stock spare parts lists.	
	Confirming "Letter of Intent" dated June 6, 1960 to Mr. J. J. Sherman - DO NOT DUPLICATE.	
	PROGRESS PAYMENTS: $2[illegible]4,200.00 with order, upon presentation of invoice.	
	SCHEDULE: 53,292.00 February, 1961	
	84,323.00 March, 1961	
	84,323.00 April, 1961	
	84,323.00 May, 1961	
	84,323.00 June, 1962	
	22[illegible],870.00 20% upon shipment	
	168,653.00 15[illegible]-30 Days after shipment	
	56,[illegible]43.00 5% Upon acceptance or 120 Days after shipment	

F O B CARS Shipping Point - Lemter, Pennsylvania
DELIVERED BY TRUCK

TERMS Sec Memo

IMPORTANT INSTRUCTIONS: FOUR COPIES OF INVOICES TOGETHER WITH ORIGINAL FREIGHT BILL, ORIGINAL BILL OF LADING, AND SHIPPING NOTICE[illegible] DUPLICATE MUST BE RENDERED TO SOUTHWEST FOREST INDUSTRIES, INC., P.O. BOX 908, PHOENIX, ARIZONA

No allowance will be made for packing, cartage or crating unless stated above.
The Purchaser will not accept billing for any material shipped in excess of that called for above without written consent of this office.
The materials covered hereby are intended particularly for use on the job indicated above.
Shipment and/or delivery by the Vendor of the materials covered hereby, with the consent of the Purchaser, shall in all cases constitute an unqualified acceptance of all the terms and conditions of this order by the vendor.

ACKNOWLEDGMENT DATE_____

The foregoing order is hereby accepted by the Vendor subject to all the terms and conditions set forth herein.

_____

_____

Order No. 8285-SW-5002

INSTRUCTIONS FOR TRANSMITTAL OF SHOP DRAWINGS AND DATA

Shop Drawings and Transmittal Letter Shall Show the Following:

Purchaser's Name
Purchase Order and Requisition Numbers
Purchaser's Drawing and/or Specification Number
Revised Drawings shall be so marked and dated

Drawings and Data Required for Approval

Within . . . . . .days after award of Purchase Order, Vendor shall send required copies of DRAWINGS, Data and two (2) copies of TRANSMITTAL LETTER TO:

The Rust Engineering Company
930 Fort Duquesne Boulevard
Pittsburgh 22, Pennsylvania
Attention: Mr. E. J. Fritschi

The above instructions also apply for revised drawings resubmitted for approval.

Drawings and Data Required After Approval as Listed Below:

After approval, Vendor shall transmit the required copies of drawings, data and two (2) copies of TRANSMITTAL LETTER TO:

The Rust Engineering Company
930 Fort Duquesne Boulevard
Pittsburgh 22, Pennsylvania
Attention: Mr. E. J. Fritschi

DRAWING & DATA REQUIREMENTS

Copies required:

7	Drawings for Approval
12	Final Approved Drawings
6	Instruction Manuals
6	Spare Parts Lists
	Reproducible Tracings
	Test Certificates

PURCHASE ORDER

SOUTHW[illegible]T FOREST INDUST[illegible]ES, INC.

PHOENIX, ARIZONA
J'Rils

Rev. 1
8285-SM-5002
ORDER NO 7-19-60
DATE [illegible]
REQUISITION [illegible]
JOB [illegible]
CONTRACT

IMPORTANT
THE ABOVE ORDER NUMBER MUST BE SHOWN ON ALL SHIPMENTS INVOICES AND CORRESPONDENCE

Dear Mr. Durkin,

Westinghouse Electric Corporation
306 Fourth Avenue - Union Bank Building
Pittsburgh 22, Pennsylvania
Attn: Mr. J. J. Sherman

WHEN TO SHIP

SHIP TO: SOUTHWEST FOREST INDUSTRIES, INC.
PULP AND PAPER MILL
SNOWFLAKE, ARIZONA

SHIP VIA

This order is subject to the terms and conditions set forth on reverse side hereof.

QUANTITY	ARTICLE	PRICE
	Please revise original order 8285-SM-5002 as follows: DELETE: Paragraph referring to prepaying transportation charges and instead bill transportation charges as F.O.B. S.P.--Freight Collect. Estimated Rail Freight Charges - $12,650.00. All other terms and conditions of original order to remain the same. (W) ORDER PG. 5 5 / 5 1 In referring to this order please use this number as a reference. Order accepted subject to conditions outlined in ~~attached~~ W. E. Corp. form of acknowledgement.	

F O B CARS S.P. Lester, Ia.
DELIVERED BY TRUCK

TERMS

IMPORTANT INSTRUCTIONS — FOUR COPIES OF INVOICES TOGETHER WITH ORIGINAL FREIGHT BILL, ORIGINAL BILL OF LADING, AND SHIPPING NOTICES IN DUPLICATE MUST BE RENDERED TO SOUTHWEST FOREST INDUSTRIES, INC., P.O. BOX 908, PHOENIX, ARIZONA

No allowance will be made for packing, cartage or crating unless stated above.
The Purchaser will not accept billing for any material shipped in excess of that called for above without written consent of this office
The materials covered hereby are intended particularly for use on the job indicated above
Shipment and/or delivery by the Vendor of the materials covered hereby with the consent of the Purchaser, shall in all cases constitute an unqualified acceptance of all the terms and conditions of this order by the vendor

ACKNOWLEDGMENT DATE_____

The foregoing order is hereby accepted by the Vendor subject to all the terms and conditions set forth herein.

_____

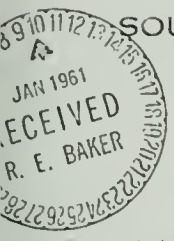
_____

Baker

PURCHASE ORDER

SOUTHW[illegible]ST FOREST INDUST[illegible]ES, INC.

PHOENIX, ARIZONA



Purchasing Agent

ORDER NO
DATE
REQUISITION
JOB
CONTRACT

IMPORTANT
THE ABOVE ORDER NUMBER MUST BE SHOWN ON ALL SHIPMENTS INVOICES AND CORRESPONDENCE

WHEN TO SHIP

O: SOUTHWEST FOREST INDUSTRIES, INC.
PULP AND PAPER MILL
SNOWFLAKE, ARIZONA

SHIP VIA

This order is subject to the terms and conditions set forth on reverse side hereof.

ANTITY	ARTICLE	PRICE

ORDER PG 88081-T

In ref[illegible] to this order please use this number as [illegible] reference

Order acknowledged by [illegible] to acceptance certified in [illegible] Corp. form of [illegible]

CARS	TERMS
REO BY TRUCK	

RTANT
ICTIONS

FOUR COPIES OF INVOICES TOGETHER WITH ORIGINAL FREIGHT BILL, ORIGINAL BILL OF LADING, AND SHIPPING NOTICES IN DUPLICATE MUST BE RENDERED TO SOUTHWEST FOREST INDUSTRIES, INC., P.O. BOX 903, PHOENIX, ARIZONA

vance will be made for packing, cartage or crating unless stated above.
chaser will not accept billing for any material shipped in excess of that called for above without written consent of this office.
erials covered hereby are intended particularly for use on the job indicated above
t and/or delivery by the Vendor of the materials covered hereby, with the consent of the Purchaser, shall in all cases constitute alified acceptance of all the terms and conditions of this order by the vendor.

ACKNOWLEDGMENT DATE_____

e foregoing order is hereby accepted by the Vendor subject to all the terms and conditions set forth herein.

_____

_____

Baker

[redacted] INDUSTRIAS, [redacted]

Westinghouse Electric Corporation — 8235-S.-5032, Rev.
Page 2 — JWB/dsh — 11/9/80

ITEM	QTY	
		TAG: NEUTRAL BUSHING ENCLOSURE
3	1	Neutral Bushing Enclosure with adapters and connectors shall be furnished with provisions for connecting a neutral grounding resistor per Bill of Material S-1.
		Price $3,0
		TAG: HYDROGEN PANEL ANNUNCIATOR
4	1	Seam Annunciator for the hydrogen panel, including "Seam" S-line tach 11-RL, model SC-AC sequence, AP plug-in model AOS-9 with flasher, test and acknowledge push-button for operation on 115 volt A.C. as manufactured by Seam Corp., Chicago, Illinois. Hydrogen pressure gage to be mounted on hydrogen control panel.
		Price $
		TAG: TURBINE-GENERATOR START-UP PANEL
5	1	Turbine Start-Up panel 90" high and 30" deep shall be furnished to match other panels in buyer's plant. Instruments shall be mounted thereon and shall be standard black case. The panel shall include the following: (Part was included in original order balance is additional).

A. Oil pressure gauges as outlined in Seller's Proposal (Included)

B. Steam pressure gauges for first stage, initial and exhaust pressures and 150 psi steam header pressure (Included)

C. Mercury Manometer — ADD - $250.00

D. Vacuum Gauge — ADD - $260.00

E. Electric [illegible] Indicator (Included)

F. Turbine Trip Switch — ADD - $50.00

G. Turbine Stop Oil Pump Light and Switch — ADD - $100.00

H. 1) Point Speed Pressure [illegible] — ADD - $1,950.00

I. Tachometer, 12 pole, shaft [illegible] Seam Corp. Type SC-AC sequence, AP plug-in model AOS-9 with flasher, test and acknowledge push-buttons for operation on 115 volt, 60 cycle A.C. Unit to be 3 high and 6 long — ADD - $790.00

Contd on page 3

Order

PURCHASE ORDER

SOUTHWEST FOREST INDUSTRIES, INC.

PHOENIX, ARIZONA

ORDER NO. Rev.#2
DATE 9205-SW-250
REQUISITION 11/9/60
JOB
CONTRACT

JWR/dsk

IMPORTANT
THE ABOVE ORDER NUMBER MUST BE SHOWN ON ALL SHIPMENTS INVOICES AND CORRESPONDENCE

nghouse Electric Corporation

WHEN TO SHIP

O: SOUTHWEST FOREST INDUSTRIES, INC.
PULP AND PAPER MILL
SNOWFLAKE, ARIZONA

SHIP VIA -3-

Thia order is subject to the terms and conditions set forth on reverse side hereof.

NTITY	ARTICLE	PRICE
QTY	The annunciator points shall be as follows: 1.) Low vacuum 2.) Low oil pressure 3.) High/low oil reservoir level 4.) High/low condensate level 5.) High bearing temperature 6.) Seal oil trouble 7.) D. C. to hydrogen panel 8.) High heater level 9.) High 50 lbs. steam temperature 10.) High 150 lbs. steam temperature 11.) High 150 lbs. steam temperature 12.) High condensate collection tank level 13.) High 225 lbs. steam temperature 14.) Turning gear and gauge 15.) Four spare annunciator points Price	$3,450.00
	IAC: THRUST BEARING INSTRUMENTATION	
8	Thermocouples for installation in thrust bearing sho with leads brought out to convenient terminal block Price	480.00
	TOTAL NET INCREASE	$26,073.00

CARS
ED BY TRUCK

TERMS

Contd. on page 4

TANT
CTIONS

FOUR COPIES OF INVOICES TOGETHER WITH ORIGINAL FREIGHT BILL, ORIGINAL BILL OF LADING, AND SHIPPING NOTICES IN DUPLICATE MUST BE RENDERED TO SOUTHWEST FOREST INDUSTRIES, INC., P.O. BOX 908, PHOENIX, ARIZONA

nce will be made for packing, cartage or crating unless stated above.
haser will not accept billing for any material shipped in excess of that called for above without written consent of this office.
rials covered hereby are intended particularly for use on the job indicated above.
and/or delivery by the Vendor of the materials covered hereby, with the consent of the Purchaser, shall in all cases constitute ified acceptance of all the terms and conditions of this order by the vendor.

ACKNOWLEDGMENT DATE_____

foregoing order is hereby accepted by the Vendor subject to all the terms and conditions set forth hercin.

_____

_____

Date

PURCHASE ORDER

SOUTHWEST FOREST INDUSTRIES, INC.

PHOENIX, ARIZONA

ORDER NO.
DATE
REQUISITION
JOB
CONTRACT

IMPORTANT
THE ABOVE ORDER NUMBER
BE SHOWN ON ALL SHIPM
INVOICES AND CORRESPON

Westinghouse Electric Corporation

WHEN TO SHIP

SHIP TO: SOUTHWEST FOREST INDUSTRIES, INC.
PULP AND PAPER MILL
SNOWFLAKE, ARIZONA

SHIP VIA

This order is subject to the terms and conditions set forth on reverse side hereof.

QUANTITY	ARTICLE	PRICE
	[illegible]	
	[illegible] $1,109,050.00	
	[illegible] 28,073.00	
	[illegible] $1,137,123.00	
	[illegible]	
	[illegible]	
	[illegible]	

F O B CARS
DELIVERED BY TRUCK

TERMS [illegible]

IMPORTANT INSTRUCTIONS

FOUR COPIES OF INVOICES TOGETHER WITH ORIGINAL FREIGHT BILL, ORIGINAL BILL OF LADING, AND SHIPPING NOTIC
DUPLICATE MUST BE RENDERED TO SOUTHWEST FOREST INDUSTRIES, INC., P.O. BOX 908, PHOENIX, ARIZONA

No allowance will be made for packing, cartage or crating unless stated above.
The Purchaser will not accept billing for any material shipped in excess of that called for above without written consent of this office.
The materials covered hereby are intended particularly for use on the job indicated above.
Shipment and/or delivery by the Vendor of the materials covered hereby, with the consent of the Purchaser, shall in all cases cons
an unqualified acceptance of all the terms and conditions of this order by the vendor.

ACKNOWLEDGMENT DATE_____

The foregoing order is hereby accepted by the Vendor subject to all the terms and conditions set forth herein

_____

_____

PURCHASE ORDER

SOUTHWEST FOREST INDUSTRIES, INC.

PHOENIX, ARIZONA

Rev.-3
ORDER NO 8305-CH-5002
DATE December 1, 1960
REQUISITION W.L.Shoenhair
JOB Southwest Forest Ind.
CONTRACT E-8085

IMPORTANT
THE ABOVE ORDER NUMBER MUST BE SHOWN ON ALL SHIPMENTS INVOICES AND CORRESPONDENCE

Taylor Greene

ingham Electric Corporation
Fourth Ave. - Union Bank Bldg.
burgh 22, Pennsylvania
ation: Mr. J. J. Sherman

JHR:DHS

WHEN TO SHIP

TO: SOUTHWEST FOREST INDUSTRIES, INC.
PULP AND PAPER MILL
SNOWFLAKE, ARIZONA

SHIP VIA

This order is subject to the terms and conditions set forth on reverse side hereof.

QUANTITY	ARTICLE	PRICE
	Please revise our original order 8305-CH-5002 as follows: CHANGE TO: Schedule of Progress Payments to be made against this purchase order in accordance with new total order price (Ref. Rev. #2) and following revised schedule: Progress Payments: $284,200.00 with order upon presentation of invoice. Progress Payment - Date $ 54,075.00 - February, 1961 $ 86,000.00 - March, 1961 $ 85,000.00 - April, 1961 $ 85,000.00 - May, 1961 $ 85,000.00 - June, 1961 $227,424.60 - 20% upon shipment $170,568.45 - 15% - 30 days after shipment $ 56,856.15 - 5% upon acceptance or 120 days after shipment $1,137,123.60 - Present total price of order All other terms and conditions of original order shall remain the same.	ORDER PG 8208/-11 (W) In referring to this order please use this number as a reference. Order accepted subject to conditions outlined in attached W. L. Corp. form of acknowledgement.

B CARS

TERMS

IVERED BY TRUCK

IPORTANT TRUCTIONS — FOUR COPIES OF INVOICES TOGETHER WITH ORIGINAL FREIGHT BILL, ORIGINAL BILL OF LADING, AND SHIPPING NOTICES IN DUPLICATE MUST BE RENDERED TO SOUTHWEST FOREST INDUSTRIES, INC., P.O. BOX 908, PHOENIX, ARIZONA

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Purchaser will not accept billing for any material shipped in excess of that called for above without written consent of this office.
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ment and/or delivery by the Vendor of the materials covered hereby, with the consent of the Purchaser, shall in all cases constitute nqualified acceptance of all the terms and conditions of this order by the vendor.

ACKNOWLEDGMENT DATE_____

The foregoing order is hereby accepted by the Vendor subject to all the terms and conditions set forth hercin.

_____

_____

PURCHASE ORDER

SOUTHWEST FOREST INDUSTRIES, INC.

PHOENIX, ARIZONA

ORDER NO
DATE
REQUISITION
JOB
CONTRACT

IMPORTANT
THE ABOVE ORDER NUMBER MUST BE SHOWN ON ALL SHIPMENTS INVOICES AND CORRESPONDENCE

WHEN TO SHIP

SHIP TO: SOUTHWEST FOREST INDUSTRIES, INC.
PULP AND PAPER MILL
SNOWFLAKE, ARIZONA

SHIP VIA

This order is subject to the terms and conditions set forth on reverse side hereof.

JAN 1961
RECEIVED
PURCHASING
P. E. BAKER

QUANTITY	ARTICLE
	[illegible]
ITEM #1	[illegible]
ITEM #2	[illegible]
	Previous Total Price of Contract $ [illegible]
	Increase per this order $ [illegible]
	Present Total Price of Contract $ [illegible]
	[illegible]
	[illegible]
	Payments: Date
	$ [illegible] February '61
	$ 000.00 March '61
	$ 000.00 April '61
	$ 000.00 May '61
	$ 000.00 June '61
	227,470.00 30% upon shipment
	170,602.50 [illegible]
	56,867.50 5% - upon acceptance of [illegible]

ORDER PG 88681

In referring to this order please use this number as a reference

Order accepted subject to conditions

F O B CARD
DELIVERED BY TRUCK

TERMS [illegible]

IMPORTANT INSTRUCTIONS

FOUR COPIES OF INVOICES TOGETHER WITH ORIGINAL FREIGHT BILL, ORIGINAL BILL OF LADING, AND SHIPPING NOTICES IN DUPLICATE MUST BE RENDERED TO SOUTHWEST FOREST INDUSTRIES, INC., P.O. BOX 908, PHOENIX, ARIZONA

No allowance will be made for packing, cartage or crating unless stated above.
The Purchaser will not accept billing for any material shipped in excess of that called for above without written consent of this office.
The materials covered hereby are intended particularly for use on the job indicated above.
Shipment and/or delivery by the Vendor of the materials covered hereby with the consent of the Purchaser, shall in all cases constitute an unqualified acceptance of all the terms and conditions of this order by the vendor.

ACKNOWLEDGMENT DATE

The foregoing order is hereby accepted by the Vendor subject to all the terms and conditions set forth herein.

(XXX)

ondon\-A
rhill
.c-7 R.W.McCune
ng E.M.Hutching
R.E.Baker
AEC

ight
hison

8285-11A
December 15, 1960
H.K.Steenhill
Southwest Forest
E-8285

ouse Electric Corporation JWR:EWS
th Ave. - Union Bank Bldg.
gh 22, Pennsylvania
. J. Sherman

When requested by jcb
superintendent

The Rust Engineering Company
Snowflake
Arizona

This purchase order covers Field Erection Engineering Supervision Services as outlined on Pages 4-B and 5-B of Westinghouse proposal dated May 18, 1960, in connection with the purchase by Southwest Forest Industries, Inc., Snowflake, Arizona, of one (1) 25,000 KW Indoor, Double Controlled Extraction Condensing Turbo-Generator Unit, on purchase order E-8285-SW-5002. ✓

All for the sum of - - - $15,300.00

Listed price is firm and not subject to escalation.

Tax exempt. (No material).

Delivered - Job Site
Snowflake, Arizona

90% of invoice as approved, within 20 days of receipt. 10% - 30 days after completion and acceptance.

/////

7-7301

J. W. Rupe
Purchasing Department

//////////////

Appendix II

In the United States District Court
For the District of Arizona

No. Civ. 860 Pct.

SOUTHWEST FOREST INDUSTRIES, INC.,
a corporation,
Plaintiff,

vs.

WESTINGHOUSE ELECTRIC CORPORATION,
a corporation,
Defendant.

REPLY TO COUNTERCLAIM

Plaintiff, Southwest Forest Industries, Inc., by and through its attorneys, replies to defendant's counterclaim as follows:

I

Admits that on or about July 6, 1960, defendant sold and plaintiff purchased a turbine generator unit from defendant for the price of $1,137,123.00 and that said unit was delivered and installed on or about December 20, 1961 but denies that said unit was then accepted by plaintiff.

II

Admits that plaintiff has paid all of the purchase price to defendant except the sum of $57,082.20 but denies that said sum is now due and owing to defendant since the same should be offset against any judgment which plaintiff might obtain by virtue of its complaint herein.

WHEREFORE, plaintiff prays that defendant take nothing by its counterclaim.

SNELL & WILMER
By: /s/ BUR SUTTER
Attorneys for Plaintiff

400 Security Building
Phoenix, Arizona 85004

COPY of the foregoing "Reply To Counterclaim" mailed this 10th day of February, 1964, to:

LEWIS, ROCA, SCOVILE, BEAUCHAMP & LINTON
Attn: Mr. Don A. Davis
Title and Trust Building
Phoenix, Arizona

Attorneys for Defendant
/s/ BURR SUTTER
Burr Sutter

Filed Jul 24 1967

In the United States District Court
For the District of Arizona

No. Civ. 860 Pct.

SOUTHWEST FOREST INDUSTRIES, INC.,
a corporation,
Plaintiff,

vs.

WESTINGHOUSE ELECTRIC CORPORATION,
a corporation,
Defendant.

AMENDED COMPLAINT

Plaintiff complains of defendant and for its cause of action alleges:

COUNT ONE

I.

Plaintiff is a corporation organized under the laws of the State of Nevada and duly qualified to do business in the State of Arizona. Defendant is a corporation organized under the laws of the State of Pennsylvania and is duly qualified to do business in the State of Arizona and is doing business in the District of Arizona.

II.

The amount in controversy exceeds the sum of $10,000.00, exclusive of interest and costs.

III.

On or about June 6, 1960, plaintiff ordered from defendant a machine commonly known as a turbine generator unit to be installed in plaintiff's Kraft and Newsprint paper mill near Snowflake, Arizona.

IV.

Defendant accepted said order and manufactured a turbine generator unit which it knew was to be the sole source of electric energy for plaintiff's mill. Defendant also knew that said mill could not be operated unless the equipment performed properly.

V.

The turbine generator unit was delivered to plaintiff's plant and installed and placed in operation on or about December 20, 1961.

VI.

Defendant negligently manufactured said turbine generator unit so that the same failed to function and perform. As soon as plaintiff ascertained that the equipment was defective, it notified defendant to that effect and defendant undertook to repair the same but such repairs were negligently made and failed to remedy the defects caused by defendant's negligence in the manufacture of such equipment.

VII.

Defendant's negligence caused damage to plaintiff in that plaintiff was required to shut down the operation of its mill for long periods until at least April 9, 1962, and plaintiff has suffered damage by reason of lost time, labor and materials and loss of business as a result of defendant's negligence.

VIII.

Plaintiff did not know and could not by the exercise of reasonable diligence have learned of defendant's negligence until after the turbine generator unit was installed and placed in operation. By reason of the aforesaid, plaintiff was damaged in the sum of Six Million Dollars ($6,000,000.00).

Wherefore, plaintiff prays:

1. For judgment against the defendant in the sum of Six Million Dollars ($6,000,000.00).

2. For its costs and disbursements incurred herein; and
3. For such other and further relief as may be proper in the premises.

SUPPLEMENTAL COMPLAINT

Comes now the plaintiff, by its attorney, and submits its Supplemental Complaint as follows:

I.

The plaintiff, on or about December 17, 1963, filed its original Complaint herein.

II.

After the original Complaint was filed, plaintiff discovered additional defects in the turbine generator unit sold and furnished by defendant to plaintiff. Such defects were in the exciter, an integral and essential part of the turbine generator unit, and were proximately caused by defendant's negligence in manufacturing such equipment. As soon as plaintiff discovered that the exciter was defective, it notified defendant of that fact and defendant failed and refused to make necessary repairs or to remedy such defect.

III.

Plaintiff did not know and could not by the exercise of reasonable diligence have learned of defendant's negligence in the manufacture of the exciter prior to July 14, 1964.

IV.

Defendant's negligence aforesaid proximately caused additional damage to plaintiff in the sum of $150,000.00.

Wherefore, plaintiff prays judgment for damages in the additional sum of One Hundred Fifty Thousand Dollars ($150,000).

COUNT TWO

I.

Plaintiff refers to paragraphs I, II, III, IV and V of Count One and the Supplement thereto and by this reference incorporates the same herein as though fully set forth.

II.

The said turbine generator unit was defective in design, materials, manufacture and assembly.

III.

The defects in the said turbine generator caused damage to plaintiff in that plaintiff was required to shut down the operations of its mill for long periods until at least April 9, 1962, and plaintiff has suffered damage by reason of lost time, labor and materials and loss of business as a result of the defects in said product designed, assembled and manufactured by defendant.

IV.

Plaintiff did not know and could not, by the exercise of reasonable diligence, have learned of the said defects until after the said turbine generator unit was installed and placed in operation. By reason of the aforesaid, plaintiff was damaged in the sum of $6,000,000.00.

Wherefore, plaintiff prays:

1. For judgment against the defendant in the sum of $6,000,000.00.
2. For its costs and disbursements incurred herein, and
3. For such other and further relief as may be proper in the premises.

COUNT THREE

I.

The claim set forth in this Count arose under the Anti-Trust laws of the United States, particularly Section 4 of the Clayton

Act (15 U.S.C. Sec. 15) and Section 1 of the Sherman Act (15 U.S.C. Sec. 1).

II.

Plaintiff is now and at all times herein mentioned was a corporation organized and existing under the laws of the State of Nevada and duly qualified to do business in the State of Arizona. Plaintiff's primary business is carried on in the State of Arizona.

III.

Defendant is a corporation organized and existing under the laws of the State of Pennsylvania, is qualified to do business in Arizona, has its principal place of business in the City of Pittsburgh, Pennsylvania and manufactures turbine generator units at Lester, Pennsylvania and Sunnyvale, California.

IV.

General Electric Company, Allis-Chalmers Manufacturing Company, Carrier Corporation, DeLaval Steam Turbine Company and Worthington Corporation (hereinafter sometimes called the "co-conspirators") participated in the combination and conspiracy hereinafter alleged and are hereby named as co-conspirators. General Electric Company is a corporation organized and existing under the laws of New York. Allis-Chalmers Manufacturing Company, Carrier Corporation and Worthington Corporation are corporations organized and existing under the laws of the State of Delaware. DeLaval Steam Turbine Company is a corporation organized and existing under the laws of the State of New Jersey.

V.

At all times herein mentioned, defendant and corporate co-conspirators were the principal manufacturers of turbine generator units in the United States with plants located in California, Massachusetts, New Jersey, New York, Pennsylvania and Wisconsin and they and each of them were engaged in manufacturing, selling, shipping and delivering such units in interstate commerce to purchasers throughout the United States, including plaintiff in the District of Arizona.

VI.

Beginning at least as early as January 1, 1951, and continuing until on or about the 1st day of July, 1960, defendant and co-conspirators engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in turbine generator units in violation of Section 1 of the Sherman Act (15 U.S.C. Sec. 1). The combination and conspiracy consisted of a continuing agreement, understanding and concert of action among defendant and co-conspirators among other things:

(a) To fix and maintain prices, terms and conditions for the sale of turbine generator units, including the prices, terms and conditions for sale to plaintiff;

(b) To submit non-competitive, collusive and rigged bids and price quotations for supplying turbine generator units to purchasers throughout the United States, including plaintiff.

VII.

In furtherance of the aforesaid combination and conspiracy, representatives of defendant and co-conspirators met from time to time to discuss the price, terms and conditions for the sale of turbine generator units and to establish bids and quotations to be made to particular prospective customers. At some of such meetings, or as a result thereof, it was agreed that defendant and corporate co-conspirators would change the prices, terms and conditions for the sale of turbine generator units and that one of them would be designated as having "position" in regard to the sale of a turbine generator unit or units to a particular prospective customer. Pursuant to such agreements, defendant and co-conspirators increased the price of a turbine generator unit offered to and purchased by plaintiff and changed the terms and conditions for the sale of such unit to plaintiff, all of which caused injury and damage to plaintiff's business and property as hereinafter set forth.

VIII.

The effects of the aforesaid combination and conspiracy were that:

(a) Prices of turbine generator units throughout the United States, including the price charged plaintiff, were raised to, fixed and maintained at high and artificial levels;

(b) Price competition in the sale of turbine generator units throughout the United States, including the sale to plaintiff, was restrained, suppressed and eliminated;

(c) Purchasers of turbine generator units throughout the United States, including plaintiff, were deprived of the benefits of free competition in the purchase of these products;

(d) Purchasers of turbine generator units throughout the United States, including plaintiff, did not receive competitive bids and quotations; and

(e) Purchasers of turbine generator units throughout the United States, including plaintiff, were forced to pay artificially fixed prices for such units which were higher than the price they would have paid had no such combination and conspiracy existed.

IX.

On the 29th day of June, 1960, a criminal proceeding was instituted by the United States in the United States District Court for the Eastern District of Pennsylvania, entitled "United States of America vs. General Electric Company, Allis-Chalmers Manufacturing Company, Westinghouse Electric Corporation, et al.", Criminal Action No. 20401, for the purpose of punishing defendant and others for the aforesaid violation of Section 1 of the Sherman Act. Defendant pleaded guilty to the indictment on December 8, 1960. Judgment of guilty was entered on this plea and sentence was imposed by the Court on February 6, 1961.

X.

On or about June 6, 1960, plaintiff purchased a turbine generator unit from defendant for the price of $1,137,123., all of which has been paid except the sum of $57,087.20. By reason of the aforesaid combination and conspiracy, plaintiff was denied the benefit of unrestricted competition in the price of turbine generator units and paid for such unit a price which was substantially

in excess of the price which it would have paid under conditions of unrestricted competition had such combination and conspiracy not existed. Plaintiff is informed and believes and on that ground alleges that, by reason of the aforesaid combination and conspiracy, the price paid for the turbine generator unit purchased by it exceeded the price which it would have paid had said combination and conspiracy not been in existence by at least $250,000.00.

Wherefore, plaintiff prays:

1. That plaintiff's damages be determined and the actual amount of its damages be trebled as required by law;
2. That plaintiff be granted its costs of litigation herein, including reasonable attorneys' fees as required by law, and
3. That plaintiff have such other and further relief as the Court may deem just and reasonable.

Dated as of the 19 day of July, 1967.

SNELL & WILMER
By /s/ ROGER W. PERRY
400 Security Building
Phoenix, Arizona
Attorneys for Plaintiff

COPY of the foregoing
delivered this 19th
day of July, 1967, to:

John J. Flynn
LEWIS, ROCA, BEAUCHAMP & LINTON
114 West Adams Street
Phoenx, Arizona 85003

Attorneys for Defendant
/s/ ROGER W. PERRY

Filed Jul 21 1967

In the United States District Court
For the District of Arizona

No. Civ. 860 Pct.

SOUTHWEST FOREST INDUSTRIES, INC.,
a corporation,
Plaintiff,

vs.

WESTINGHOUSE ELECTRIC CORPORATION,
a corporation,
Defendant.

ANSWER TO AMENDED COMPLAINT

Defendant, for its answer to the amended complaint filed on July 19, 1967, admits, denies and alleges as follows:

I

Defendant admits the allegations of paragraphs I and II which relate to the status of the parties and the amount in controversy.

II

Admits the allegations of paragraph III except alleges that plaintiff ordered the unit from the defendant on or about July 6, 1960.

III

Defendant denies the allegations of paragraph IV and alleges that the turbine generator unit was manufactured in accordance with the specifications furnished it by the plaintiff and the Rust Engineering Company, a firm employed by the plaintiff to determine such specifications.

IV

Admits the allegations of paragraph V to the effect that the generator unit was delivered, installed and placed in operation but alleges that the unit was installed and operational by October 15, 1961, rather than December 20, 1961, as alleged.

V

Defendant denies the allegations of paragraphs VI, VII and VIII of plaintiff's complaint except as to the allegation that defendant did perform service upon the unit after delivery and installation.

VI

If plaintiff was damaged in the sum alleged or in any other sum, such damage was solely caused by or contributed to by plaintiff's negligence and plaintiff assumed the risk of such damage, if any.

VII

Plaintiff's claim as asserted is barred in whole or in part by the statute of limitations.

ANSWER TO SUPPLEMENTAL COMPLAINT

I

Admits the allegations of paragraph I of the Supplemental Complaint.

II

Denies the allegations of paragraphs II, III and IV of the Supplemental Complaint.

III

If plaintiff was damaged in the sum alleged or any other sum such damages were solely caused by or contributed to by the negligence of plaintiff and plaintiff assumed the risk of such damages, if any.

IV

Plaintiff's claim, if any, is barred by the statute of limitations.

ANSWER TO COUNT TWO

I

Defendant incorporates by reference its answer to Count One and to the Supplemental Complaint as though fully set forth herein.

II

Denies the allegations of paragraphs II, III and IV of Count II.

III

If plaintiff was damaged in the sum alleged or in any other sum, such damage was solely caused by or contributed to by plaintiff's negligence and plaintiff assumed the risk of such damage, if any.

IV

Plaintiff's claim, if any, is barred by the statute of limitations.

V

Count Two fails to state a claim upon which relief may be granted.

ANSWER TO COUNT THREE

I

Defendant is without information or knowledge sufficient to form a belief as to the allegations contained in paragraph I of Count Three of plaintiff's complaint, and therefore denies the same.

II

Defendant is without information or knowledge sufficient to form a belief as to the allegations contained in paragraph II of Count Three of plaintiff's complaint, and therefore denies the same.

III

Defendant admits the allegations of paragraph III.

IV

This defendant denies the existence of any combination or conspiracy referred to in paragraph IV and is without information or knowledge sufficient to form a belief as to the remaining allegations contained in paragraph IV of Count Three of plaintiff's complaint, and therefore denies the same.

V

Defendant admits that it has engaged and is now engaging in the manufacture and sale in interstate commerce of turbine generators. Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph V, and therefore denies the same.

VI

Defendant denies the allegations of paragraph VI.

VII

Defendant denies the allegations of paragraph VII.

VIII

Defendant denies the allegations of paragraph VIII.

IX

Defendant admits the allegations of paragraph IX, but it further avers that it did not admit the allegations of the indictment and that each and every allegation of paragraph IX is irrelevant and immaterial to any claim that may be stated by the complaint.

X

Defendant denies the allegations of paragraph X except to admit the purchase price of the turbine generator unit and the amount remaining unpaid by the plaintiff for same as alleged.

Wherefore, having fully answered plaintiff's complaint, the defendant requests that it be dismissed, that it recover its costs of suit, that it have judgment against the plaintiff in accordance with its counterclaim filed herewith.

COUNTERCLAIM

Defendant, for its counterclaim against plaintiff, alleges:

I

On or about July 6, 1960, plaintiff purchased from defendant a turbine generator unit for the agreed price of $1,137,123. The generator unit was delivered, installed and was operational on or about October 15, 1961.

II

Plaintiff has failed to pay $57,082.20 of the purchase price, which sum is now due and owing to the defendant and has been since December 15, 1961, pursuant to the terms of the agreement between the parties.

Wherefore, defendant prays for judgment against plaintiff on its counterclaim in the sum of $57,082.20 with interest thereon at the legal rate from December 15, 1961, until paid, for its

costs of suit herein, and for such other and further relief as to the court may seem proper.

LEWIS ROCA BEAUCHAMP & LINTON
By /s/ JOHN J. FLYNN
John J. Flynn
Attorneys for Defendant

Copy of the foregoing delivered
this 21 day of July, 1967, to:

Roger W. Perry and
Burr Sutter
Snell & Wilmer
400 Security Building
Phoenix, Arizona 85004
Attorneys for Plaintiff

/s/ JOHN J. FLYNN
John J. Flynn

Filed—Jul 31 1967
Lodged—Aug 2 1967

In the United States District Court
For the District of Arizona

No. Civ. 860 Pct.

SOUTHWEST FOREST INDUSTRIES, INC.,
a corporation,
Plaintiff,

vs.

WESTINGHOUSE ELECTRIC CORPORATION,
a corporation,
Defendant.

AMENDMENT OF COMPLAINT—JULY 29, 1967

COUNT FOUR

I

Plaintiff refers to Paragraphs I, II, III and IV of COUNT ONE of this complaint and by this reference incorporates the same herein as though fully set forth.

II

Plaintiff purchased the aforesaid turbine generator unit to be the sole source of electric energy for a Kraft and Newsprint paper mill near Snowflake, Arizona.

III

Defendant had knowledge of the purpose for which said turbine generator unit was purchased and then and there warranted the same to be in all respects fit, proper and adequate for such purpose.

IV

Plaintiff relied on said warranties, but the equipment was defective in design, materials, manufacture, assembly and workmanship and was inadequate and unsuited for use in plaintiff's business in that it failed to provide electric energy at the times and in the quantities required for the operation of plaintiff's mill.

V

As soon as said defects in design, manufacture, materials, workmanship, assembly and unfitness of the equipment was ascertained, plaintiff notified defendant and defendant thereupon undertook to remedy the defects in said equipment but negligently failed to do so.

VI

Plaintiff agreed to pay the sum of $1,137,123.00 for said equipment and has paid all of said sum except $57,087.20.

VII

As a direct and proximate result of the aforesaid breaches of warranty in the sale of said equipment and in defendant's attempts to correct said defects and to repair the equipment, plaintiff has suffered damage in lost time, labor and materials and loss of profits and in overhead expenses while, by reason of the defects in the equipment, plaintiff's mill was totally or partially shut down.

VIII

By reason of the aforesaid, plaintiff has been damaged in the sum of Five Million Dollars ($5,000,000.00).

Wherefore plaintiff prays:

1. For judgment against defendant in the sum of Five Million Dollars ($5,000,000.00);
2. For its costs and disbursements incurred herein; and
3. For such other and further relief as may be proper in the premises.

Dated this 31st day of July, 1967.

SNELL & WILMER
By /s/ ROGER W. PERRY
Roger W. Perry
400 Security Building
Phoenix, Arizona 85004
Attorneys for Plaintiff

COPY of the foregoing
Amendment of Complaint—
July 29, 1967 delivered
this 31 day of July,
1967 to:

John J. Flynn
LEWIS ROCA SCOVILLE BEAUCHAMP & LINTON
114 West Adams Street
Phoenix, Arizona 85003
Attorneys for Defendant

/s/ ROGER W. PERRY

Filed Aug 7 1967

In the United States District Court
For the District of Arizona

No. Civ. 860 Pct.

SOUTHWEST FOREST INDUSTRIES, INC.,
a corporation,
Plaintiff,

vs.

WESTINGHOUSE ELECTRIC CORPORATION,
a corporation,
Defendant.

AMENDED ANSWER AND COUNTERCLAIM TO PLAINTIFF'S AMENDED COMPLAINT FILED AUGUST 7, 1967

Defendant, for its answer to the amended complaint filed on August 7, 1968, admits, denies and alleges as follows:

ANSWER TO COUNT ONE

I

Defendant admits the allegations of paragraphs I, II, III, and IV.

II

Admits the allegations of paragraph V to the effect that the generator unit was delivered, installed and placed in operation but alleges that the unit was installed and operational by October 15, 1961, rather than December 20, 1961, as alleged.

III

Defendant denies the allegations of paragraphs VI, VII and VIII of plaintiff's complaint except as to the allegation that

defendant did perform service upon the unit after delivery and installation.

IV

If plaintiff was damaged in the sum alleged or in any other sum, such damage was solely caused by or contributed to by plaintiff's negligence and plaintiff assumed the risk of such damage, if any.

V

Plaintiff's claim as asserted is barred in whole or in part by the statute of limitations.

ANSWER TO SUPPLEMENTAL COMPLAINT

I

Admits the allegations of paragraph I of the Supplemental Complaint.

II

Denies the allegations of paragraphs II, III and IV of the Supplemental Complaint.

III

If plaintiff was damaged in the sum alleged or any other sum such damages were solely caused by or contributed to by the negligence of plaintiff and plaintiff assumed the risk of such damages, if any.

IV

Plaintiff's claim, if any, is barred by the statute of limitations.

ANSWER TO COUNT TWO

I

The court has granted summary judgment as to Count II.

ANSWER TO COUNT THREE

I

Defendant is without information or knowledge sufficient to form a belief as to the allegations contained in paragraph I of Count Three of plaintiff's Complaint, and therefore denies the same.

II

Defendant is without information or knowledge sufficient to form a belief as to the allegations contained in paragraph II of Count Three of plaintiff's complaint, and therefore denies the same.

III

Defendant admits the allegations of paragraph III.

IV

This defendant denies the existence of any combination or conspiracy referred to in paragraph IV and is without information or knowledge sufficient to form a belief as to the remaining allegations contained in paragraph IV of Count Three of plaintiff's complaint, and therefore denies the same.

V

Defendant admits that it has engaged and is now engaging in the manufacture and sale in interstate commerce of turbine generators. Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph V, and therefore denies the same.

VI

Defendant denies the allegations of paragraph VI.

VII

Defendant denies the allegations of paragraph VII.

VIII

Defendant denies the allegations of paragraph VIII.

IX

Defendant admits the allegations of paragraph IX, but it further avers that it did not admit the allegations of the indict-

ment and that each and every allegation of paragraph IX is irrelevant and immaterial to any claim that may be stated by the complaint.

X

Defendant denies the allegations of paragraph X except to admit the purchase price of the turbine generator unit and the amount remaining unpaid by the plaintiff for same as alleged.

ANSWER TO COUNT FOUR

I

Defendant adopts by reference the answers given to paragraphs I, II, III and IV of Count One and incorporates them herein.

II

Defendant admits the allegations of paragraph II.

III

Defendant denies that it had knowledge of the purpose for which the unit was purchased. Defendant denies that it warranted the same as proper and adequate for such purpose. Defendant affirmatively alleges that it relied upon the specifications furnished by Rust Engineering Company, a firm employed by plaintiff to determine such specifications, and manufactured a unit precisely in accordance with said specifications.

IV

Defendant denies the allegations of paragraph IV and affirmatively alleges that if the unit was not adequate or suited for use in plaintiff's business, that the responsibility lies in the specifications furnished to the defendant by the Rust Engineering Company, a firm employed by the plaintiff to determine such specifications, which specifications were precisely followed in the manufacturing of the unit.

V

Defendant denies the allegations of paragraph V, except to allege that the defendant did perform some service on the unit after delivery and installation.

VI

Defendant admits the allegations of paragraph VI.

VII

Defendant denies the allegations of paragraph VII.

VIII

Defendant denies the allegations of paragraph VIII.

IX

As a further and affirmative defense the defendant alleges that if plaintiff was damaged in the sum alleged or in any other sum such damage was solely caused by or contributed to by plaintiff's negligence or that plaintiff assumed the risk.

X

As a further and affirmative defense the defendant alleges that plaintiff's claim as asserted is barred in whole or in part by the statute of limitations.

Wherefore, having fully answered plaintiff's complaint, the defendant requests that it be dismissed, that it recover its costs of suit, that it have judgment against the plaintiff in accordance with its counterclaim filed herewith.

COUNTERCLAIM

Defendant, for its counterclaim against plaintiff, alleges:

I

On or about June 6, 1960, plaintiff purchased from defendant a turbine generator unit for the agreed price of $1,137,123. The generator unit was delivered, installed and was operational on or about October 15, 1961.

II

Plaintiff has failed to pay $57,082.20 of the purchase price, which sum is now due and owing to the defendant and has been since December 15, 1961, pursuant to the terms of the agreement between the parties.

Wherefore, defendant prays for judgment against plaintiff on its counterclaim in the sum of $57,082.20 with interest thereon at the legal rate from December 15, 1961, until paid, for its costs of suit herein, and for such other and further relief as to the Court may seem proper.

LEWIS ROCA BEAUCHAMP & LINTON

By /s/ PAUL G. ULRICH
John J. Flynn
James Moeller
Paul G. Ulrich
Attorneys for Defendant

Copy of the foregoing delivered
this 7 day of August, 1967, to:

Roger W. Perry and
Burr Sutter
Snell & Wilmer
400 Security Bldg.
Phoenix, Arizona 85004
Attorneys for Plaintiff

/s/ PAUL G. ULRICH
Paul G. Ulrich

Filed Sep 8 1967

In the United States District Court
For the District of Arizona

No. Civ. 860 Pct.

SOUTHWEST FOREST INDUSTRIES, INC.,
a corporation,
Plaintiff,

vs.

WESTINGHOUSE ELECTRIC CORPORATION,
a corporation,
Defendant.

OPINION

Southwest Forest Industries, Inc., a Nevada corporation (hereafter Southwest), which owns and operates a pulp and paper mill near Snowflake, Arizona, sued Westinghouse Electric Corporation, a Pennsylvania corporation (hereafter Westinghouse), claiming damages by reason of lost time, labor, materials, and loss of business as the result of the alleged (1) negligent manufacture of the turbine generator unit supplied to the Snowflake mill by Westinghouse, (2) negligent repair of the unit when defects caused by Westinghouse negligence in the manufacture of the equipment were discovered, and (3) negligent or other breach of warranty because the equipment supplied was inadequate and unsuited for use in plaintiff's business in that it failed to provide electric energy at the times and in the quantities required for the operation of the mill.[1] A supplemental complaint alleged negli-

1. The negligence allegations were further refined, in a joint pretrial statement, as follows:

"Plaintiff contends defendant was negligent in one or more of the following particulars:

"A. In the manufacture of the turbine generator unit by reason of leaving foreign materials in the control system of the unit.

"B. In the supervision of the installation of the control system of the unit at Snowflake, Arizona, by utilizing inadequate flushing procedures.

gence in the manufacture of an exciter unit, a part of the turbine generator unit, that was not discovered until after the original complaint had been filed. An additional amending count alleged that the turbine generator unit was defective in design, materials, manufacture and assembly, to "take advantage of the newly recognized doctrine of 'strict liability in tort'." The facts upon which the allegations of strict liability in tort and the resulting damages are based are the same as those alleged in support of the negligence and breach of warranty counts.[2]

After the trial of this matter had commenced, and testimony and exhibits had been received in evidence, Westinghouse renewed certain motions for partial summary judgment. Southwest agreed to this procedure and that there were no issues of material fact

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"C. In the repair of the control system after foreign materials were first discovered.

"D. In the design of a filtration system for the control system."

The factual basis of the breach of warranty claim was stated by the plaintiff to be the same as that of the negligence claim. In addition, Westinghouse counterclaimed for $57,082.20, the balance due on the purchase price of the turbine generator unit. The joint pretrial statement agreed that this amount was the unpaid balance, that in the event Southwest did not recover on its complaint Westinghouse was entitled to judgment on its counterclaim in that amount plus interest at 6% per annum from December 15, 1961, until paid, and that in the event Southwest obtained a judgment against Westinghouse, Westinghouse was entitled to an offset of $57,082.20.

2. Exhibits submitted by Southwest provide "the total dollar value of consequential damages claimed, together with mathematical computations supporting such claim." These include recovery of fixed operating costs for the period of delay in startup of the mill caused by difficulties with the turbine generator unit, the cost of repairs made by Rust Engineering Company to the turbine generator unit, and additional caustic (used in the papermaking process) purchased to offset that lost from the recovery boiler as a result of shutdown of the turbine, together with recovery of fixed operating costs and the cost of repairs relating to the exciter unit. No damages are claimed resulting from personal injuries or physical harm to property.

The damages sought resulting from the alleged improper manufacture, installation, and repair of the turbine generator unit were suffered between December 1961 and April 1962. Those resulting from the alleged improper manufacture of the exciter unit were suffered in July 1964.

with respect to the matters before the Court for decision.[3] The determination of these motions turns upon the terms and legal effect of various agreements entered into by the parties for the sale, erection, and installation of the turbine generator unit, together with a consideration of the policies supporting the doctrine of strict liability in tort. There follows a summary of the facts necessary for this determination.

Upon the completion of certain preliminary feasibility studies, Southwest[4] and Rust Engineering Company (hereafter Rust) entered into a formal agreement under which Rust was to construct the Southwest pulp and paper mill to be located near Snowflake, Arizona.[5] The total design, construction, purchase, and installation of the mill and its equipment were to be accomplished by Rust, as was the final decision as to what equipment was to be purchased for the mill.

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3. The parties also agreed that the Court might consider certain documents that had either been admitted into evidence at the trial or were attached as exhibits to designated depositions, that there existed no dispute as to any material facts necessary to decide the legal issues of what documents constituted the contract and whether Westinghouse was liable thereunder for the claimed consequential damages, that the specified exhibits were genuine in that they were what they purport to be, that the only question at this stage of the proceedings was the legal significance of the testimony and exhibits, in connection with the motion for summary judgment, and that neither side had any evidence to present contradicting or impeaching any of the testimony in the specified depositions.

4. Southwest was incorporated as a Nevada corporation on September 30, 1935. The Snowflake mill is one of several operating divisions of the company, others of which include logging operations and lumber mills. The consolidated balance sheet for the Snowflake division alone shows its assets to be in excess of $37,000,000 for the year 1962. The Snowflake mill employed 426 persons as of July 1964.

5. Article 1, paragraph C(10) of this agreement provided that Rust would "conduct its purchasing program and work in connection with the Project so as to obtain benefit from manufacturer's warranties with respect to, and guarantees of the performance of, machinery, equipment and other apparatus and facilities to be a part of the Project and to pass to Southwest, as soon as possible, all such manufacturer's warranties and guarantees." Supplementing the contract between Rust and Southwest was a separate agreement appointing a Rust purchasing officer as the purchasing agent to act on behalf of Southwest.

Pursuant to these agreements, Rust sent to Westinghouse on May 3, 1960, an invitation to bid on the turbine generator unit. While not a part of the contract between the parties, the invitation is significant in determining Rust's expectations.[6] Westinghouse then sent to Rust, on May 18, 1960, a formal proposal containing detailed specifications for the turbine generator unit. The first page of the proposal's covering letter stated that the proposal was "subject to the terms and conditions on the back of this quotation."[7]

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6. Paragraph 13 of the invitation included, with other requirements to be furnished with the proposal, the following:

> "GUARANTEE: Supplier shall be required to guarantee the performance of his equipment and the material furnished to the extent that he shall replace, f.o.b. job site, without additional cost to the owner, any unsuited to the purpose intended during the first year of use of same in active service, upon notice by the engineers or owner."

This guarantee was not a part of a standard request for quotations used by Rust, but was specially drafted for this particular Southwest order.

7. These terms and conditions included the following:

> "Westinghouse, in connection with apparatus sold hereunder, agrees to correct any defect or defects in workmanship or material which may develop under proper or normal use during the period of one year from the date of shipment, by repair or replacement f.o.b. factory of the defective part or parts, and such correction shall constitute a fulfillment of all Westinghouse liabilities in respect to said apparatus, unless otherwise stated hereunder. Westinghouse shall not be liable for consequential damages. . . .
>
> "On orders placed with Westinghouse in accordance with this quotation the above conditions shall take precedence over any printed conditions that may appear on your standard order form."

In addition, the formal proposal itself, at page 5B, contained the following warranty with respect to installation and services:

> "Westinghouse warrants that the recommendations of the Field Engineer shall accurately reflect the best judgment of a qualified engineer in the premises, but no other warranty or obligation of any kind shall extend thereto or be implied therefrom and Westinghouse shall not be liable for any act or omission of those not its employes nor for any injury, loss, damage, delay, failure to operate, or other things whatsoever due in whole or in part to any cause other than failure of its engineering recommendations to fulfill such warranty. The liability of Westinghouse with respect to the Field Engineer's services shall not, in any event, exceed the cost of correcting defects in the apparatus, and Westinghouse shall not be liable for consequential damages."

On June 6, 1960, the Rust purchasing officer designated as Southwest's agent sent to Westinghouse a letter of intent,[8] upon which Rust expected Westinghouse to begin to prepare engineering drawings, start the work under the contract, and expend funds in its furtherance. Westinghouse next sent to Rust, on June 13, 1960, a form of acknowledgment,[9] which was eventually sent on to Southwest by Rust.

On July 6, 1960, the formal purchase order referred to in the Rust letter of intent of June 6, 1960, was sent to Westinghouse on a Southwest purchase order form.[10] This purchase order was received by Westinghouse, which, after determining the shipping date of the turbine generator unit, stamped on the face of the

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8. The letter of intent stated:

"It is the intention of Southwest Forest Industries, Inc., as soon as practicably possible, to issue a formal order to cover the purchase of one 25,000 kw turbine-generator unit, generally in accordance with your above referenced proposal.

"However, in the interim, please accept this letter of intent as your authorization to proceed establishing this date as the order date for determination of delivery for the turbine-generator, which we understand had been established for approximately 13½ months."

9. The face of the customer's copy of the acknowledgment form states: "See reverse side for terms and conditions." On the reverse side is a warranty identical to the warranty appearing as a part of the Westinghouse proposal.

10. The warranty contained in the Southwest purchase order form provided:

"(2) The materials to be furnished hereunder shall comply with the plans and specifications furnished to the Vendor by the Purchaser or Engineer. The Vendor warrants the proper quality, character, adequacy, suitability and workability of the materials. The Vendor and the materials furnished hereunder are subject to the approval of the Engineer. The Vendor agrees to indemnify the Purchaser and Engineer against all loss or damage arising from any defect in materials furnished hereunder. . . .

"(12) All negotiations and agreements prior to the date of this order are merged herein and superseded hereby, there being no agreements or understandings other than those written or specified herein. In the event of conflict between any proposal of Vendor specifically referred to herein and this order, and as to all matters or points not expressly covered by such proposal, the terms and conditions of this order shall govern."

purchase order (and each of the subsequent purchase orders received thereafter) a conditional acceptance[11] and returned it to Rust.

Revised copies of the Southwest purchase orders were sent by Rust to Westinghouse in October, 1960. These revisions removed from the original contract between Westinghouse and Southwest the erection and installation of the turbine generator unit, substituting an independent contract between Rust and Westinghouse for such services. The new erection and installation contract accepted page 5B of the original Westinghouse proposal, which contained a warranty substantially identical to the original Rust request for warranty and the warranty contained in the Westinghouse proposal.[12]

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11. The following Westinghouse stamp appears on the first page of each Southwest purchase order form:

"Order *PG88081.*

"In referring to this order please use this number as a reference.

"Order accepted subject to conditions outlined in ~~attached~~ WE Corp form of acknowledgment."

The longhand notation, "will ship W/O [week of] 7/10/61, J. J. Rice 8/9/60," appears on the face of the first purchase order form. The word "attached" was lined out because the Westinghouse form of acknowledgment had previously been sent to Rust. See notes 7 and 9 *supra* for the Westinghouse form of acknowledgment.

Each Southwest purchase order form provided a space for signature and acknowledgment that "The foregoing order is hereby accepted by the Vendor subject to all terms and conditions set forth herein." On none of the Southwest purchase order forms was the space for acknowledgment signed.

12. See note 7, *supra.* Other facts before the Court show that Rust was requested by Southwest in August or September, 1962, to extend the Westinghouse warranty. Rust and Westinghouse exchanged correspondence, the effect of which was that the replacement portion of the warranty would be extended, but that no blanket extension of the warranty could be made. A Southwest memorandum dated April 9, 1962, refers to documents that Southwest's attorney would like to have in preparing an insurance claim for the damages suffered at the mill. This memorandum refers specifically to the form of warranty contained in the Westinghouse order acknowledgment form that had by that time been received by Southwest.

To the Court these facts also show at these late dates that Southwest clearly confirmed their understanding that it was the Westinghouse form of warranty, limited in time and obligation, that was applicable to the sale.

On July 24, 1967, some days prior to trial, the Court granted defendant's motion for partial summary judgment as to the damages claimed under the theory of strict liability in tort because the principles underlying the doctrine of strict liability in tort for defective products[13] were not applicable. All damages sought by Southwest in this case are consequential damages.[14] The turbine generator unit is a highly specialized, custom-built piece of machinery, built to particular specifications and tested in the factory before delivery, under supervision of engineers representing both parties.

The circumstances of this case do not bring the plaintiff within the class of consumers, type of transaction, or damages suffered that created the need for relief based on strict liability in tort. Neither the philosophy nor the theory of the doctrine of strict liability in tort nor the actual holdings of the cases involved sup-

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13. See, *e.g., Greenman v. Yuba Power Prods., Inc.,* 59 Cal.2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962); *Vandermark v. Ford Motor Co.,* 61 Cal.2d 256, 37 Cal. Rptr. 896, 391 P.2d 168 (1964); *Seely v. White Motor Co.,* 63 Cal.2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965); *Price v. Gatlin,* 241 Ore. 315, 405 P.2d 502 (1965); *Brewer v. Reliable Automotive Co.,* 240 Cal. App.2d 228, 49 Cal. Rptr. 498 (1966). *See generally* Restatement (Second) Torts § 402(A); Prosser, *The Fall of The Citadel—Strict Liability to the Consumer,* 50 Minn. L. Rev. 791, 822-23 (1966).

The *Seely* opinion, *supra,* makes it plain that law of warranty recovery for economic loss has not been entirely superseded by strict liability in tort in a commercial setting, that it is inappropriate to hold a manufacturer responsible for the quality of performance of its products in a purchaser's business unless it agrees that the product was designed to meet the purchaser's demands, and that the risk that the product will not meet the purchaser's economic expectations may fairly be charged to the purchaser unless the manufacturer agrees that it will bear that risk. There was no such agreement in this case.

14. See, *e.g., Monarch Brewing Co. v. George J. Meyer Mfg. Co.,* 130 F.2d 582 (9th Cir. 1942); *Pipe Welding Supply Co. v. Gas Atmospheres, Inc.,* 201 F. Supp. 191 (N.D. Ohio 1961); *Wallich Ice Machine Co. v. Hanewald,* 275 Mich. 607, 267 N.W. 748 (1936); *Ford Motor Co. v. Puskar,* 394 S.W.2d 1 (Tex. Civ. App. 1965); *Washington & O.D. Ry. Co. v. Westinghouse Elec. & Mfg. Co.,* 120 Va. 620, 89 S.E. 131 (1916), *reversed in part on rehearing on other grounds,* 91 S.E. 646 (1916).

port an extension of the doctrine of strict liability in tort to the present facts.[15]

With respect to the issues relating to the formation, interpretation, and validity of the agreements of the parties, the substantive law of Pennsylvania is controlling.[16] At all relevant times, the Uniform Commercial Code was there in effect and controls the legal result of the agreements here. The sections of the Code most directly involved are sections 2-204, 2-206, 2-207, and 2-719, relating to the formation of a contract and the ability of the contracting parties to limit their liability for consequential damages.[17]

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15. This conclusion has been confirmed with the decision by the Arizona Court of Appeals on July 27, 1967, of *O. S. Stapley Co. v. Miller* (not yet reported), which holds that the doctrine of strict liability in tort has been adopted in Arizona. The court, however, decided only that " 'a manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being,' *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897, 900, 27 Cal. Rptr. 697 (1962)." The *Stapley* court also approvingly cited *Rossignol v. Danbury School of Aeronautics,* 227 A.2d 418, 424 (Conn. 1967), in which the Connecticut court, applying the elements set forth in Restatement (Second), Torts § 402 A, required as a basis for recovery that the defective product cause "physical harm to the consumer or user or to his property." 227 A.2d at 424. See also *Bailey v. Montgomery Ward & Co.,* (Ariz. Ct. App., Aug. 17, 1967) (not yet reported). None of these elements is present here.

Arizona substantive law as to this count of the complaint applies where, as here, jurisdiction is based upon diversity of citizenship of the parties and the damages suffered occurred in Arizona. See, *e.g., Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 487, 61 S. Ct. 1020, 85 L.Ed. 1477 (1941); *Maloy v. Taylor,* 86 Ariz. 356, 346 P.2d 1086 (1959); *Friedman v. Friedman,* 40 Ariz. 96, 9 P.2d 1015 (1932).

16. See, *e.g., Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941); *Ross v. Ross,* 96 Ariz. 249, 393 P.2d 933 (1964); *Ruby v. United Sugar Companies, S.A.,* 56 Ariz. 535, 109 P.2d 845 (1941); *Schram v. Smith,* 97 F.2d 662 (9th Cir. 1938).

All purchase negotiations and documents material to this transaction were executed in Pennsylvania.

17. This case does not involve any attempted disclaimer of warranties, the subject of Uniform Commercial Code section 2-316. As comment (2) to that section indicates, U.C.C. sec. 2-316(4) provides that questions of limitation of remedy are governed by U.C.C. secs. 2-718 and 2-719, and are "in no way affected by" U.C.C. sec. 2-316, which describes the manner in which the warranties themselves may be modified or excluded entirely from an agreement. 12 A. Purdon's Pa. Stat. Ann. 192, 193 (perm. ed. 1954).

At all times in the negotiations and in the contract documents, and in the complaint itself, which alleges June 6, 1960, as the contract date, all of the parties operated on the assumption that the Westinghouse proposal and the Rust letter of intent, as confirmed by the Westinghouse order acknowledgment form, constituted the contract for the sale of the turbine generator unit. The conduct of the parties during the entire time and up to the filing on August 2, 1967, of plaintiff's "Amendment of Complaint—July 29, 1967", cannot reasonably be explained on any other basis.[18] By every objective test there was an agreement as to the nature of the con-

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18. There were experienced purchasing departments, staffs of engineers, and legal departments available to all three companies. Rust has had great experience in purchasing electrical equipment from Westinghouse.

The Rust letter of invitation appended a form of warranty specifically tailored for the Southwest contract. The form of warranty was, setting aside for the moment the consequential damage limitation, substantially the same as the Westinghouse warranty. When the Westinghouse proposal was received, a copy of it was sent to Southwest. Southwest commented upon the proposal, made some technical suggestions, but made no comment or objection as to the form of warranty.

The letter of intent set forth above refers generally to the Westinghouse proposal. There is no reference to any differences intended between the warranty on the back of the purchase order form and of any other warranty intended to be obtained by Rust. Later, when the formal purchase order was sent to Westinghouse, a conditional acceptance was stamped on the purchase order and returned to Rust, the acknowldgment form on the Southwest purchase order not being signed. This recurred with respect to each Southwest purchase order that was submitted. Although there was testimony that Rust generally does not consider that it has a contract until it receives back its own signed acknowledgment form and that Rust always tries to get its own form of acknowledgment signed, in this purchase of $1,137,000 these details apparently were not sufficiently important to delay the transaction.

All purchasing departments involved were familiar with the Westinghouse order and acknowledgment forms. Further, the references to pages 4B and 5B of the original Westinghouse proposal containing the Westinghouse form of warranty by Rust when it changed its purchase orders to provide for erection services and installation of the turbine generator unit in a separate contract is significant as indicating the intentions and expectations of the parties. Other correspondence and testimony before the Court shows that as late as September, 1962, the parties had in mind the Westinghouse warranty with its one-year term, rather than the much broader Southwest warranty of indefinite duration.

tract in effect and its terms and conditions[19] and particularly as to the express warranty involved.

The limitation of liability provisions in the Westinghouse proposal and form of acknowledgment are sufficient, under Uniform Commercial Code Sec. 2-719, to limit its liability so as to exclude consequential damages based on breach of contract; there is no evidence before the Court that Westinghouse failed to perform its obligations under its warranty. Westinghouse engineers repeatedly visited the Snowflake mill in response to Southwest's requests in relation to the turbine generator unit. Limitations of liability under Pennsylvania law are valid and enforceable. The parties to an agreement may contract as to limitation of liability resulting from breach of both express and implied

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19. This objective test is consistent with the Uniform Commercial Code, which recognizes that "a contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract," sec. 2-204(1), that an acceptance may be made "in any manner and by any medium reasonable in the circumstances," sec. 2-206(1)(A), and that "a definite and seasonable expression of acceptance or a written confirmation sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional terms," sec. 2-207(1).

The Rust letter of intent was just such a "definite and seasonable expression of acceptance." The letter was a general acceptance, requiring action by Westinghouse in furtherance of the contract, and not expressly made conditional on assent to additional or different terms. Under the Code, therefore, there was a contract between the parties at the time of the Rust letter of intent.

The effect of the July 6, 1960, Southwest purchase order is determined by sec. 2-207(2), and comments (2) and (3) thereto. The additional terms are to be construed as proposals for additions to the contract. The additional terms here, paragraphs (2) and (12) of the Southwest purchase order, never became a part of the contract because: (1) The original Westinghouse offer expressly limited acceptance to its terms; (2) the proposed additional warranty constituted a material alteration to the prior agreement; and (3) the proposed terms were uncontrovertedly rejected by the Westinghouse stamp affixed to the face of the purchase order form that referred to a form of acknowledgment that Rust had previously received, confirming the warranty contained in the formal proposal and its covering letter, as to which there never was any objection.

warranties.[20] There have been no allegations of unconscionability, and there was no personal injury; this trubine generator unit can hardly be considered "consumer goods", within the meaning of section 2-719. Although liability for consequential damages resulting from negligence was not expressly limited in the Westinghouse form of warranty, the provision limiting liability so as to exclude consequential damages is sufficiently broad also to limit liability resulting from negligence and, in particular, to limit liability to replacements required as the result of faulty workmanship.[21] Under these facts there also can be no recovery for consequential damages based upon a theory of negligence, apart from a contractual duty.[22] Any remedy for breach of the duty of repair

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20. See, *e.g., Eimco Corporation v. Joseph Lomardi & Sons,* 193 Pa. Super. 1, 162 A.2d 263 (1960); *Bechtold v. Murray Ohio Mfg. Co.,* 321 Pa. 423, 184 A. 49 (1936); *Magar v. Lifetime, Inc.,* 187 Pa. Super. 143, 144 A.2d 747 (1958); *Shafer v. Reo Motors, Inc.,* 108 F. Supp. 659 (W.D. Pa. 1952), *aff'd,* 205 F.2d 685 (3rd Cir. 1953). *See generally National Steel Corp. v. L. G. Wasson Coal Mining Corp.,* 338 F.2d 565 (7th Cir. 1964); *American Can Company v. Horlamus Corp.,* 341 F.2d 730 (5th Cir. 1965); *Pipe Welding Supply Co. v. Gas Atmospheres, Inc.,* 201 F. Supp. 191 (N.D. Ohio 1961); 3 Bender's U.C.C. Serv. sec. 7.03[3], at 7-48 (1966).

21. See, *e.g., Shafer v. Reo Motors,* 205 F.2d 685 (3rd Cir. 1953); *Charles Lachman Co. v. Hercules Powder Co.,* 79 F. Supp. 206 (E.D. Pa. 1948); *Cannon v. Bresch,* 307 Pa. 31, 160 A. 595 (1932); *Atherton v. Clearview Coal Co.,* 267 Pa. 425, 110 A. 298 (1920); *Wright v. Sterling Land Co.,* 157 Pa. Super. 625, 43 A.2d 614 (1945); *Siegel Co. v. Philadelphia Record Co.,* 348 Pa. 245, 35 A.2d 408 (1944); *Mayo v. McCloskey & Co.,* 200 F. Supp. 7 (E.D. Pa. 1961). *See generally Fire Association of Philadelphia v. Allis Chalmers Mfg. Co.,* 129 F. Supp. 335 (N.D. Iowa 1955).

22. See, *e.g., Seely v. White Motor Co.,* 63 Cal.2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965); *Byrd v. English,* 117 Ga. 191, 43 S.E. 419 (1903); *Stevenson v. East Ohio Gas Co.,* 47 Ohio L. Abs. 586, 73 N.E.2d 200 (1946); *Ultramares Corp. v. Touche,* 255 N.Y. 170, 174 N.E. 441 (1931); *Polo v. Adelbrau Brewery,* 185 Misc. 775, 60 N.Y.S. 2d 346 (App. Term 1946); *City of Oxford v. Spears,* 228 Miss. 433, 87 So.2d 914 (1956); *see generally* Restatement (Second), Torts sec. 388 et seq.; 1 Harper & James, *Torts,* sec. 6.10, at 509-10 (1956); *compare Southern Pac. R. Co. v. Gonzales,* 48 Ariz. 260, 61 P.2d 377 (1936). For a discussion of the application of such authorities in the determination of Arizona law, see generally Ulrich, *Federal Diversity Jurisdiction—The Problem of Ascertaining Applicable State Law in the Absence of State Authorities,* Arizona Weekly Gazette, p. 3, col. 1, May 9, 1967.

under the warranty was similarly limited to repair and replacement of defective materials and workmanship for a period of one year.

To summarize, the Court is of the opinion that: (1) the documents constituting the contract between Westinghouse and Southwest with respect to the sale of the turbine generator unit were the Westinghouse proposal and the Rust letter of intent, as confirmed by the Westinghouse form of acknowledgment; (2) the effect of these documents and of the conduct of the parties with respect thereto is to include the Westinghouse form of warranty and limitation of liability as a part of the agreements of the parties; (3) the terms of the Westinghouse form of warranty and limitation of liability under Pennsylvania law are sufficient to limit Westinghouse liability so as to exclude recovery of consequential damages resulting from breach of express or implied warranty or from negligence, in the manufacture, installation, and repair of the turbine generator unit; (4) the damages claimed to have been suffered by the plaintiff in this case are consequential damages within the meaning of the Westinghouse form of warranty and Uniform Commercial Code Sec. 2-719; (5) on the facts of this case, there can be no recovery based upon a theory of strict liability in tort; and (6) there is no separate tort duty, apart from a duty based on contract, to compensate the plaintiff for the consequential losses that it claims to have suffered.

For these reasons, therefore, there being by agreement of counsel no genuine issue as to any material fact, the Court has entered its order granting defendant's motions for partial summary judgment.

Dated this 7th day of September, 1967.

/s/ Wm. P. Copple
Wm. P. Copple
United States District Judge.

Filed Sep 8 1967

In the United States District Court
For the District of Arizona

No. Civ. 860 Pct.

SOUTHWEST FOREST INDUSTRIES, INC., a corporation,
Plaintiff,

vs.

WESTINGHOUSE ELECTRIC CORPORATION, a corporation,
Defendant.

ORDER AND JUDGMENT

(Partial Summary Judgment)

Trial to a jury was commenced in this matter on August 8, 1967. The original complaint was filed December 17, 1963. Issue was joined on plaintiff's amended complaint filed July 24, 1967, together with plaintiff's "Amendment of Complaint—July 29, 1967" filed August 2, 1967, and defendant's "Amended Answer and Counterclaim to Plaintiff's Amended Complaint filed August 7 (sic), 1967." There had been various other amendments and changes made in plaintiff's complaint in the interim. Count One and the Supplemental Complaint set forth in the final pleadings sounds in negligence; Count Two, a "strict liability in tort" theory; and Count Four, a warranty theory; all contain, however, prayers for consequential damages only.

Prior to time of trial, Count Three of the final complaint (antitrust) had been severed for a later and separate trial and a stipulation entered into by the parties and filed which is dispositive of defendant's counterclaim. Prior to trial the Court had granted defendant's Motion for Summary Judgment as to Count Two of the complaint (products liability theory). Count Four of plaintiff's complaint (Amendment of Complaint—July 29, 1967) restated a warranty theory which had previously been withdrawn by plaintiff.

On August 10, 1967, the third day of trial, with the consent of counsel for plaintiff, defendant renewed its motion for partial summary judgment as to all counts except the severed antitrust count. The question raised by the motion being:

> First: What warranty was extended by defendant to plaintiff in the sale of the machinery which is the subject matter of the suit?
>
> Second: Under the warranty found as a matter of law, is defendant liable to plaintiff for the claimed consequential damages?

Counsel for both sides agreed that these were questions of law to be decided by the Court from the trial record to that time together with certain stipulated exhibits and depositions. Counsel also agreed that as to these issues and the agreed record there was no dispute as to any material issue of fact and no additional evidence bearing on these two legal questions available to either party.

The Court, having considered the stipulated evidence and read and heard the memoranda and arguments of counsel in support of and in opposition to defendant's said motion for partial summary judgment, has determined that the applicable warranty upon which the sale of machinery was based and which establishes and limits the liability of the defendant and upon which there had been and was a "meeting of the minds" at all pertinent times, is that referred to in Exhibit C-2 attached to plaintiff's answers to defendant's written interrogatories (filed by plaintiff on August 17, 1964) reading as follows:

> "WARRANTY Westinghouse, in connection with apparatus sold hereunder, agrees to correct any defect or defects in workmanship or material which may develop under proper or normal use during the period of one year from the date of shipment by repair or by replacement f.o.b. factory of the defective part of parts, and such correction shall constitute a fulfillment of all Westinghouse liabilities in respect to said apparatus, unless otherwise stated hereunder. Westinghouse shall not be liable for consequential damages."

The Court has further determined as a matter of law that defendant, by virtue of the limitations in this warranty, is not liable to plaintiff for the claimed consequential damages under any theory set forth in those portions of the final pleadings subject to the motion for partial summary judgment. There was no evidence before the Court that defendant had failed to perform its affirmative warranty duties of correction and replacement.

The Court announced from the bench on August 11, 1967, its decision to grant the motion for partial summary judgment.

Now, Therefore, It Is Ordered that defendant's motion for partial summary judgment as to all portions of plaintiff's complaint other than Count Three (antitrust) be granted. Because defendant's costs incurred to date are not fairly separable as being applicable to these counts alone and not to Count Three, taxation of costs will be made in connection with the ultimate final determination of the case.

The Court hereby expressly determines that there is no just reason for delay and expressly directs the entry of final judgment herein in accordance with the foregoing, notwithstanding the fact that there remain other claims that have not been disposed of by this order and judgment.

On July 21, 1967, plaintiff and defendant filed their Pretrial Statement containing a stipulation (paragraph numbered 5) regarding defendant's counterclaim and providing that ". . . in the event plaintiff does not recover on its complaint, defendant is entitled to judgment on its counterclaim . . ." Until the entire complaint has been adjudicated, the Court does not feel it appropriate to enter final judgment on the counterclaim.

For benefit of counsel, the Court is concurrently filing a detailed opinion upon which this Order and Judgment is based.

Dated this 7th day of September, 1967.

/s/ Wm. P. Copple
Wm. P. Copple
United States District Judge

ARGUMENT OF COUNSEL

In Mr. Flynn's argument to the Court on August 11, 1967, he proposed the following inference from Appellee's Exhibit Y-1:

> And the significance of this is that at the bottom of it, your Honor will find, I believe, 'your order has been entered as our general order number. See reverse side for terms and conditions.' And here again, spelled out in exactly the same language are the same warranty provisions.
> (Appeal Transcript, p. 236)

Mr. Flynn also raised and argued the following inference from Appellee's Exhibit Y-2:

> It's dated March 27, 1962, and indicates its distribution and that certainly as early as March 27, 1962 the significance of terms and conditions contained on the back of that document were well known to Mr. Baker because there is a little tab attached to it dated March 29, 1962, which says 'six photostats each of three pages. Six on back of page 1 (terms and conditions).'
> (Appeal Transcript, p. 237)

With regard to Exhibit 2-A, Mr. Flynn, counsel for Westinghouse, would reach the following inference which could be drawn from this document:

> Number 1: It says absolutely nothing about one year as this matter started off of the ground and this is a total addition as distinguished from any other aspect of the case. Theoretically, under that form Westinghouse Electric Company would be liable on the item forever. There is no one year limitation and so it is completely different in a total addition and this appears on each one of the revision documents.
>
> Again, if the court please, each is stamped and returned unsigned. There does appear on the first one the notation, 'Will ship week of July 10, 1960, J. J. Rice, 8-9-60.' I think this is thoroughly explained in Mr. Rice's deposition that because this delivery date was an open end matter and had to be scheduled and confirmed back through the shop, that he waited until this was done. When it was, he inserted that as the date and stamped the documents, 'subject to the Westinghouse Electric Corporation form acknowledgement.'

He also explained the reason that it was not attached, but because on June 13th it had already gone to Rust Engineering Company, and that he returned this document to Mr. Fristchi, I believe his name was, at Rust Engineering Company.
(Appeal Transcript, pp. 238-239)

With regard to the testimony of Mr. Steenhill, in his deposition, Mr. Flynn argued the following inferences were to be derived therefrom:

In August or September, according to Mr. Steenhill's deposition, he received a telephone call from Mr. Baker which there was a request to extend the Westinghouse warranty, and I think this is of substantial significance, if the court please, and the deposition indicates that the reason for the extension was predicated on the fact that the annual tear down had to be extended for a period of time, and because of this they were asking to extend the warranty. Now the only warranty to be extended would be the one-year warranty, and if your Honor please, I think that it was quite clear from Mr. Steenhill's deposition the exhibit that you have before you which is the letter from Mr.—that was attached to his deposition, which was in response to some correspondence from Mr. Steenhill to Mr. Boes of Westinghouse indicating that the repair and replacement portion of the warranty would be extended, but no blanket extension of the warranty could be made.

I submit, if your Honor please, that this is confirmation that in everybody's mind as of that date there simply was no question that the Westinghouse warranty, one-year warranty requested by Rust and proposed by Westinghouse and accepted by Rust Engineering Company on behalf of South-West Forest Industries, was in full force and effect.
(Appeal Transcript, pp. 240-241)

Again, Mr. Flynn raised the following inferences with regard to Appellee's Exhibit Y-2:

Now, if your Honor please, it seems crystal clear that throughout the period and at the time when the difficulties arose in April of 1962, the documents obviously were gathered together and analyzed and there simply was no

> question as of that time in anybody's mind, including the plaintiff in this case, that it was the Westinghouse warranty that applied in the case and as late as—we find, August of the same year, several months later, Mr. Baker asked Mr. Steenhill to ask Westinghouse to extend that warranty.
> (Appeal Transcript, p. 242)

With regard to the letter of intent from Southwest to Westinghouse, dated June 6, 1960 (Ex. EEE), Mr. Flynn argued the following inferences:

> Now, the June 6th, 1960 order has to be the letter of intent. There's no other document in this record, and it is ordered to the proposal submitted by Westinghouse on May 18, 1960, and it appears to me that it's crystal clear by the very allegation and the state of the pleadings which are part of the record in this case, June 6th, 1960, is the date that they accepted the offer extended by Westinghouse.
> (Appeal Transcript, p. 244)

With regard to the knowledge of Mr. Ruyak, Mr. Flynn would advance the following inference from his deposition:

> And certainly Mr. Ruyak knew what the significance of an order acknowledgement form is and certainly he knew what the significance of the stamp on the front of its was; and he certainly knew what the significance of a purchase order that was unsigned was. (Appeal Transcript, p. 248)

Mr. Flynn would also raise the following inferences from Ex. EEE and the Appellant's pleadings:

> At that time we called to your Honor's attention Section 2-204 of the Uniform Code applicable in Pennsylvania, and we argued at that time, and I think our memorandum supports that, that the letter of intent and as now plead in their own pleadings, all tied together was the contract between the parties at that time and the acceptance and at that point there was certainly no misunderstanding or variance or disagreement of any kind between the parties to this transaction, Westinghouse and Rust acting on behalf of Southwest Forest Industries.
> (Appeal Transcript, pp. 248-249)

Again, Mr. Flynn advanced from Ex. EEE an inference that a contract existed as of that date:

> I would submit, if the court please, that and without conceding for an instant that the documents in this case clearly show that a contract existed between these parties as is alleged even in the plaintiff's own pleading by the letter of intent of June 6. (Appeal Transcript, p. 252)

Mr. Flynn also advanced the following inferences from the one-year extension requested by Southwest:

> Consequently, I submit, if your Honor please, that in the commercial world there was no question as to what the warranty was between these parties, and I don't believe there was even any question in Mr. Baker's mind as to what the warranty was in this case. I think they have known all the time what the warranty was in this case. I think when they called and asked to extend the one-year Westinghouse, this proves what they knew they had in mind when Mr. Steenhill made the calls. I think when they drafted their pleadings, including their amendments, and as they stand before the court today, they knew then and they know now exactly what the warranty in this case was and a pleading drafted stating that they placed an order on June 6 can only relate to the letter of intent which was submitted because of the May 18, 1960 proposal and the order acknowledgement of June 13, 1960. (Appeal Transcript, p. 253)

Mr. Flynn, in the following excerpts from the transcript, states that the historic facts (the Exhibits) raised the following inferences:

> Each document in the sequence in this matter has been produced, and I submit that they are the exact documents that we urge were the facts in this case, the facts submitted to your Honor are the exact facts that I argued on Monday as being the facts that controlled this case and which were disputed by Mr. Perry on the basis that there is nothing in the record to support an acknowledgement form, nothing in the record to support this, and so forth.
>
> I think that even Mr. Perry at that time was unaware that in fact there was maintained in the Southwest Forest

> Industries office such a file, that set forth all of these documents. Clearly Mr. Baker got them together and took them to Mr. Fennemore as far back as 1962 at or about the time this matter occurred.
> (Appeal Transcript, pp. 254-55)

Counsel for Southwest, Mr. Perry and Mr. Sutter, have also argued the various inferences that were raised from the historic facts and documents before the Court.

With regard to Exhibit CCC, the Appellant's counsel argued that an entirely different inference arose from the inference that the defendant's counsel, Mr. Flynn, would imply. Mr. Sutter states:

> However, I would like to go back briefly to his reference to Exhibit CCC, which was the—particularly the second page of the Rust invitation to bid and paragraph 13 thereof which Mr. Flynn would imply is identical or virtually identical with the limitations of liability contained in the Westinghouse proposal. That is not true because in paragraph 13 there is no language whatsoever that limits liability or excludes consequential damages whereas the Westinghouse proposal seeks to go further. The two are not identical in that respect, and it cannot be said that Westinghouse in its proposal was accepting a proposal made by Rust as far as the limitation of liability was concerned. (Appeal Transcript, p. 261)

With regard to the letter of intent, dated June 6, 1960, (Ex. EEE) Appellant's counsel raised an entirely different inference than that which was raised by the Appellee's counsel:

> Now, I'd like to look specifically at the letter of intent which was sent out by Rust Engineering on June 6, 1960. That letter opens by saying, 'It is the intention of Southwest Forest Industries, Inc., as soon as practicably possible to issue a formal order to cover the purchase of one 25,000 kw generator unit generally in accordance with your above referenced proposal.' It then goes on and refers specifically to the establishment of a delivery date, but that is the only specific item to which reference is made. An acceptance generally in accordance with your above proposal does not mean that negotiations are ended or that the terms and conditions of the contract have been agreed upon.

Mr. Flynn made the statement that upon sending out the letter of intent, Mr. Ruyak of Rust Engineering expected Westinghouse to start manufacturing on the strength of the letter of intent, but look at what Mr. Ruyak said in his deposition in that regard at page 16. He was asked the question: 'Is the letter of intent the acceptance of the vendor's proposal?'

His answer was: 'I would say not necessarily simply because a letter of intent is so preliminary to actually getting down into the finite language of the contract, I don't think you can interpret the letter of intent as actually part of a proposal or acceptance of a proposal.'

Question: 'What happens, Mr. Ruyak, if the vendor complies with the terms of the letter of intent and starts his date of delivery on drawings?'

Answer: 'Well, we hope that the vendor will commence doing the preliminary engineering work in the spirit of the letter. We hope the vendor will commence to do the engineering work in the spirit of the letter, but there is also the question that he might not accept our terms and conditions, too, when he receives our formal order, so this is something that may have to be worked out later on.'

So clearly when Mr. Ruyak sent out the letter of intent or it was sent out by Rust, there was no intention on the part of those people that a contract was then being created and Mr. Ruyak says, 'In all cases there are further negotiations to be carried out.' The terms and conditions must be agreed upon and they did not expect Westinghouse to start manufacture of the unit. They hoped that perhaps they would start on the preliminary engineering work on the basis of the letter of intent. Whether Westinghouse did or did not was a matter of policy for them to decide upon.

Now, in the deposition of Mr. Rice, he indicates that the letter of intent would not be considered as an acceptance of the Westinghouse proposal, but that a formal purchase order would be subsequently following and it would be that on which they relied.

(Appeal Transcript, pp. 263-265)

Also, the inferences raised by Mr. Sherman's testimony as contained in his deposition are entirely conflicting as contended by the parties, and as stated by Mr. Sutter:

So all that it does according to Mr. Sherman when the letter of intent comes in is to enter an order on the division. I assume he means the manufacturing division to confirm that space.

In other words, they use the letter of intent to call the manufacturing division and say, 'We expect to have an order for a 25,000 kw turbine generator unit coming in. Please reserve or set aside space in your manufacturing schedule for that purpose.' That is all that I can see that they do as far as the letter of intent is concerned.

This is brought out even more at page 11 of Mr. Sherman's deposition where he was asked a question: 'Did you know that sometime after your form of general order was prepared that Westinghouse Electric Corporation received a formal purchase order from Southwest Forest Industries for the turbine generator?'

Answer: 'I would know that that happened.'

Question: 'Do you have a recollection that in fact it did happen?'

Answer: 'Yes, because this is the way a salesman gets his credit, when the treasury and order department say we really have an order from the customer at this stage of the game, and that's when the purchase order comes in when we say we really have an order from the customer at this stage of the game. *Prior to that, everything is considered to be in negotiation or primary stages and it's negotiation when the purchase order is received that Westinghouse considers that they do have an order.*'

(Appeal Transcript, pp. 267-268) (Emphasis added)

Mr. Sutter also stated that the only inference that can be derived from the letter of intent (Ex. EEE) is:

Under the facts in the case and the depositions of the people who were principally involved in the formation of this contract, I cannot see how the letter of intent and the Westinghouse proposal can be said to form the contract involved in this litigation. There was something left to be done and it was more than a mere formalizing of the contract because the subsequent events indicate that there were substantial changes made in the proposal and in the ultimate contract, principally in the warranty provision, but

also in other matters dealing with price and other terms and conditions in the contract.

On July 6th, Rust Engineering sent to Westinghouse the formal purchase order which is marked Plaintiff's Exhibit 12 in this case. That was stamped with the Westinghouse stamp form of acknowledgement and it was held until August 10th by Mr. Rice who according to his deposition said that he held it for that length of time in order to be able to give the customer a firm delivery date.

Now, there is one very important element of the contract that had not been settled at that time. It was highly significant or highly important to Southwest Forest Industries that they have a firm delivery date for this piece of equipment that would fit into the construction schedule of the mill. It would be vain and futile for them to spend $20,000,000, $25,000,000 or more constructing a mill at Snowflake, Arizona, and have all of the other equipment sitting there for a year or two, or even a matter of only three or four or six months waiting for a turbine generator to arrive. So delivery of this piece of equipment which might be said to be the heart of the mill since it supplied the electricity on which the mill was to operate was an important item, that delivery date was extremely important. So there was a very material element of the contract that was not fixed and not determined until Mr. Rice returned the purchase order with the delivery date on it.

(Appeal Transcript, pp. 268-270)

Also, the parties are in dispute as to the conflicting inferences that may be drawn from the testimony of Mr. Rice and Mr. Ruyak, as Mr. Sutter stated:

> Mr. Rice admits in his deposition that they were not attached to the purchase order when it was returned. Mr. Ruyak not once, but repeatedly in his deposition said he didn't know what forms of acknowledgement Westinghouse might have been referring to. He had no knowledge of what those terms and conditions might be. . . .
>
> Mr. Ruyak was positive and explicit in his statement not once, but many times on questioning by Mr. Flynn, that he did not know what the terms and conditions of the Westinghouse forms of acknowledgement were. Now Mr. Ruyak is the only one who testified on this point. I would say at

least a half a dozen times in his deposition he testified to that effect, so these items or this form of acknowledgement which was not disclosed, and they may have assumed that it had been disclosed or that somebody at Rust knew something about it, but there's no evidence in the record to that effect, being undisclosed, it could not become part of the contract.

It is therefore our position that the acceptance by Westinghouse by placing the rubber stamp on the purchase order and by having Mr. Rice's signature appear on that purchase order is sufficient to form the contract and that that is the contract between the parties. (Appeal Transcript, pp. 272-273)

The various inferences drawn from the historic facts, and documents by the Appellant and Appellee are in direct controversy and conflict as stated by Mr. Sutter:

We submit that under all the documentary evidence, the depositions of the witnesses and the other evidence in this case, that the contract before the court in this case is that form by the purchase order and its acceptance by Westinghouse and that the warranties and dates are those specified on that purchase order. (Appeal Transcript, p. 274)

SUMMARY OF DEPOSITIONS

In the deposition of Paul Kelly, an employee of Westinghouse he states that he went to Snowflake, Arizona, on December 12, 1961, when the No. 2 extraction valve had closed suddenly (Deposition, p. 7) because the orifice was blocked with metal chips (Deposition, pp. 10-12). Mr. Kelly again returned to Snowflake on January 27, 1962, because of the poor operation of the No. 2 extraction regulator. (Deposition, p. 22). He then dismantled the regulators and found that they had slight scoring on both pistons and cylinders, which was caused by hard foreign matter (Deposition, p. 25). He then found foreign matter, or chips, in the oil reservoir, which was located on the ground floor of the power house, and the oil from the oil reservoir was pumped from the reservoir up into the turbine generator unit (Deposition, p. 27). Mr. Kelly does not recall doing anything about the scoring on the pistons and cylinder walls of the No. 2 regulator, and the only thing he did in an attempt to find out what had caused the scoring, was to keep his eye open when he opened the regulators for any foreign matter (Deposition, pp. 33-34). On March 22, 1961, Mr. Kelly again returned to the Appellant's plant, and found that the turbine unit was only operating fairly, in that the No. 2 extraction was not holding the pressure quite as well as he would have liked to have seen it. (Deposition, pp. 35-36) On March 27, 1961, he took the regulator apart and found additional scoring had taken place on the power piston and cylinders and that the orifice feeding the B2 cup valve was partially plugged with mill scale. (Deposition, p. 40) Also, upon finding the mill scale, he drained the oil reservoir for the first time. (Deposition, pp. 41-42).

Mr. Kelly states the oil from the oil reservoir was pumped up from the reservoir into the turbine to lubricate the bearings and other portions of the turbine, and that between the reservoir and the extraction controls there were no filters on the oil lines at this time, as they were installed later (Deposition, p. 45). Mr. Kelly states that in January of 1962 he removed the pistons and found scoring on the pistons and cylinders and that on March 27th, he

again removed the pistons and found scoring, and that the scoring was of a greater magnitude in March than it had been in January, and that he had found the same problem again in the same orifice where he had encountered the difficulty in December. (Deposition, pp. 48-50).

Mr. Kelly goes on to state in his deposition that there was improper machining on the compensator bushing, which is something that could have occurred at the factory, and that on April 1, 1962, he also found interference between the compensator rods and the cup seat valve in the compensator. He states there was not enough tolerance between the moving parts to permit free movement, and that they hit and rubbed when they were not supposed to. He also states this is something that could have occurred at the factory. On April 1, 1962, Mr. Kelly also found a small amount of mill scale and a gelatinous substance in the compensator, which was very similar to the foreign material which he had previously found in the orifice on the extraction regulator, and in response to the following question, "You made no effort to determine its source?", Mr. Kelly answered, "Well we didn't dismantle the entire piping system." (Deposition, pp. 67-69).

Mr. Kelly then continued by saying that the power piston cylinder showed definite scoring and some scratches were apparent on the pistons again, and that there was more damage done to the pistons and cylinders on this occasion than he had seen on his visit in January and February (Deposition, pp. 70-72).

Mr. Kelly goes on to state that as far as he was personally concerned, he felt the cleaning up of the pistons and cylinders, which was on April 1, 1962, was all that was indicated at the time as being required. However, he does state that on April 2, 1962, the 60-pound extraction Servo motor started to oscillate because the piston rod, which is a vertically moving piston rod, began moving up and down and that this was not normal under the circumstances. He states that they then took the Servo motor apart and found what appeared to be several small pieces of mill scale in the pilot relay mechanism. The mill scale which he found was similar to that which he found in the oil reservoir and in the orifice on the regulator

extractor unit No. 2. (Deposition, pp. 77-79). Mr. Kelly stated at this time he did not attempt to determine the source of the mill scale, although he did look at a few pipes they had off between the regulator and the Servo motor (Deposition, pp. 78-79). On April 9, 1962, Mr. Kelly states that the mill was shut down so that repairs to the regulator block could be made. These repairs were done at Karlson Machine Works in Phoenix, Arizona, where the regulator block was bored out and sleeved, and bushings put in and new pistons installed. Also, the No. 2 extraction Servo motor was disassembled, inspected, and reassembled and some of the pipe was disassembled and pickled with acid for the purpose of removing any foreign material that might be inside the pipe. Mr. Kelly says the pickling was done at the recommendation of Mr. Baker of Southwest Forest Industries. Mr. Kelly also states that at this time a filter was installed in the high pressure oil line, immediately upstream of the regulator so that the oil would be passing through the filter just prior to entering the regulator block. (Deposition, pp. 90-94(a)). Mr. Kelly then states that on approximately April 16, 1962, the steam turbine generator went back on the line and operated satisfactorily. (Deposition, pp. 96-97).

The deposition of Mr. Ralph Willard LeGates, an engineer for Westinghouse, shows that he arrived at the Snowflake plant on March 31, 1962, and that Mr. Kelly advised him that the extraction regulators were not operating right, that he could not get them set, and that they were just in general difficulties. Mr. LeGates stated he had been informed by Mr. Kelly that he had worked for some time attempting to set the extraction regulators and had been unsuccessful. (Deposition, p. 38). Mr. LeGates states that they checked the unit over, reset the control, and tried to put it back on the line, but they were not successful in getting what he considered good operation from the unit, as the extraction controls were the principal trouble. He also states they found the compensator bushing had been improperly machined as it had tool marks in it where it should have had a smooth surface, and that this undoubtedly occurred at the factory (Deposition, pp. 41-42).

In the Deposition of Mr. Henry A. Parzick, an engineer for Westinghouse, he states that around Christmastime he was informed that problems had developed with the extraction regulator. He states the 60-pound regulator was oscillating and that the only thing they could attribute this condition to after an examination of it, was, of course, the foreign matter in the regulator, itself. He was present when the foreign matter was discovered in the regulator (Deposition, pp. 9-11).

In the Deposition of Mr. Raymond E. Baker, an employee of Southwest, he states that on December 28, 1961, they experienced further difficulty in the operation of the steam turbine generator. It went back on the line at 2:45 p.m. on December 29, 1961, and on the next day the extraction control still was not functioning properly, with one of the extraction valve motors locked in one position. He states that on January 3, 1962, after several attempts, it was shown that the 60-pound extraction control still would not operate properly, and on January 8, 1962, the other extraction control went out of order, and on January 9, 1962, springs were replaced on the extraction operating motors and various other adjustments were made. During this period of time, more foreign material was found in the hydraulic system. (Deposition, pp. 36-37). Mr. Baker then states that the operation was reasonably satisfactory between January 9, 1962, and January 22, 1962, until there was a mill shut-down because of power failure in the well field and during the process of shutdown, a ruptured disc on a 60-pound steam line ruptured, apparently because the 60-pound extraction control valve did not operate quickly enough. On start-up the second one failed and the machine was shut down again, repairs made to the piping, and the ruptured disc replaced. On start-up, both extraction controls hung-up very badly and would not control, so they contacted the Westinghouse people (Deposition, p. 40). Mr. Baker goes on to state that at this time, they were relying primarily upon Westinghouse to make whatever corrections were necessary to get the unit functioning (Deposition, p. 42). On January 24, 1962, after repairs to the piping and the ruptured disc, the unit was put back into operation;

however, during that day there was sufficient load on the mill to put the extraction stages into operation and it became apparent they would not work at that time, and Southwest then tried to operate in a curtailed manner and make arrangements to redo the job and redo the repairs. The mill was again shut down in the early morning hours of January 29, 1962, and it was found that the power piston cylinder wall had been scored on the 60-pound extraction control (Deposition, p. 45). On January 30, 1962, the unit went back on the line, with some variation in the steam pressure in the 235-pound line and the Southwest people felt that it was still not functioning properly. However, Westinghouse maintained it was satisfactory. It continued to operate in that manner with some variation in pressure until the early morning of March 20, 1968, when the 235-pound control started sticking again, and there was another shut-down at 8:00 a.m. on the morning of the 21st day of March, 1962. Upon examination, it was found that both of the pistons and cylinder walls had been scored again. They were polished and then on the start-up the controls functioned improperly on both the 60-pound and the 235-pound mechanisms. The mill was again shut down on the morning of March 27, 1962. Again, the cylinder walls were scored and there was an additional delay in waiting for a new oil filter that was to be installed in the system, and the mill was finally re-started on March 29, 1962. On start-up, it was impossible to get the 235-pound extraction into operation, so they had to operate the groundwood plant at a reduced load and by the 31st of March, 1962, the 60-pound was also out of control and would not operate. On April 1, 1962, the plant was again shut down and on April 2, 1962, it was back on the line at 7:35 a.m., but it was impossible to get the 235-pound extraction working and the other one was fluctuating in pressure. Mr. Baker was advised by Mr. Eikner, General Manager of Westinghouse Large Turbine Division in Philadelphia, that because of the scoring that had taken place, and then the increase in clearance due to the polishing of the original score marks, they were continuing to get binding that was causing the continuing score marks and continuing binding.

Mr. Baker was advised it would be impossible to get satisfactory operation because of the original scoring and polishing out.

On the morning of April 8, 1962, the mill again began a shutdown, and at this time the block and pistons were taken to Phoenix, Arizona, and Hanson Machine Company bored out a cylinder to a larger diameter to accommodate the sleeves that were being furnished by Westinghouse. (Deposition, pp. 48-50).

Q. All right. On that date did you personally observe a defect in the equipment?
A. Yes. I saw leakage around the seals at the top of the power pistons and I saw that the springs were not functioning properly.
Q. And at that time did you have a conversation with Mr. Adams and Mr. Canavan?
A. At that time, yes, some.
Q. And where did that conversation take place?
A. In the turbine room.
Q. And who was present?
A. Mr. Adams and Mr. Canavan.
Q. All right. Will you recite or relate to the jury that conversation as you remember it?
A. Well, as I recall, we talked about the difficulties at that time that they had with the spring at the Servo motor operating the extraction valve and at the oil seals at the top of the power pistons in the extraction regulator or block. They had previously dismantled it and had replaced these seals and they were still leaking.
Q. Did they tell you why?
A. No, they didn't tell me why at that time.
Q. Is that the extent of the conversation you remember at this time?
A. So far as I recall.
(Appeal Transcript, pp. 132-133)

Q. What did you see?
A. Well, they had obtained in the meantime a new spring to install into the extraction Servo motor. We made arrangements to shut the mill down by the next morning at which time they replaced the spring.
(Appeal Transcript, p. 133)

Q. Now, sir, on that occasion did you have a conversation at the turbine room about the malfunction of the unit?
A. Yes, sir, I did.
Q. And who was present?
A. Mr. Pozek and Mr. Kelly.
Q. Tell us that conversation, please.
A. After they had told me that they had found scoring in

the cylinder wall and pistons of the 60-pound extraction governor of the control mechanism, we talked about the desirability of taking apart the 235-pound piston, the corresponding system, regulating the 235-pound regulator's valve.

Apparently they had previously not decided to do that. We did take it apart. Scoring was found in the cylinder wall of that mechanism as well as on the piston, and there was some small particles of iron filings present.

Q. Will you tell the jury whether in a proper hydraulic system iron filings are to be found in the hydraulic system?

(Appeal Transcript, pp. 134-135)

Q. BY MR. PERRY. Answer it, please.

A. You cannot tolerate the presence of iron filings in a hydraulic system operating mechanisms that were depending upon as close clearances as there are in this without doing extreme damage and causing malfunctions in the unit.

Q. And will you explain to the jury why that is so?

A. Because the parts have to be free to move without friction. The clearances are very small. The presence of a small iron filing which is very sharp on its edges would get caught in these clearances and by the movement of the piston would cause scoring and then cause friction or binding and when the piston was not free to move, the control system could not operate.

(Appeal Transcript, p. 138)

Q. Is a properly functioning exciter essential to the operation of a turbine generator?

A. Absolutely.

Q. Do you have any direct personal knowledge of trouble which was experienced with the exciter at Snow Flake during July, 1964?

A. I do.

Q. What problems were experienced during July, 1964 with the exciter?

A. The first occurrence was the darkening or . . . . of one bar and burning of one bar of the armature of the exciter, and that evidenced itself by arcing between the brushes and the commutator.

(Appeal Transcript, pp. 139-140)

A. After discovering the severe arcings that was taking place and the burning of one bar in particular, we knew that we

had to shut down because first of all we tried polishing to remove the effects of the arcing that had taken place, polishing the bars, started up again and it reoccurred very quickly. We called for help. First of all, we talked to the technical people at Sterns-Rogers consulting—

Q. Excuse me, Mr. Baker. You should not relate any conversations you had with people other than with Westinghouse people, but you can tell physically what was discovered to be wrong with the unit if you know from your personal knowledge.

A. Well, we did not get help from Westinghouse on this job, we got help from—

Q. Well, did you send the unit somewhere for repair?

A. Yes, sir. After we had a General Electric service manager there to look at it, he told us that it would have to go to a shop to be repaired; and we sent it to Phoenix to General Electric Repair Shop.

(Appeal Transcript, p. 142)

Q. All right. What was that defect which was discovered?

A. There was a loose connection between the riser from the bar, commutator bar, and the field coil lead. It had been soldered only in two very short hairline spots rather than the full contact faces being soldered and that had parted breaking the contact between the commutator bar and the field coil lead.

Q. All right, sir. Was that repaired?

A. That was repaired.

Q. And was the unit returned to Snowflake and put back in operation?

A. Yes, sir.

Q. How long was your mill down during that period of repair?

A. As I remember, it was about 36 hours.

Q. And after the unit was placed back in service following that repair, how long did it continue to operate without difficulty?

A. It barely went on the line until trouble started again.

(Appeal Transcript, pp. 143-144)

Q. All right. What was the trouble this time?

A. Two additional bars were burning badly and there was more severe arcing.

Q. Do you know of your own personal knowledge what was discovered when the unit was inspected in Phoenix on this second occasion?

A. Yes, sir.

Q. What was it?

A. Two additional bars had—the connections between the riser from the bars and the field coil leads had separated.

Q. Will you describe the welding as it was done, the silver soldering, rather?

A. It was very similar to the first one, to—or very small portion or hairline contacts of the bar with the riser with the field coil lead by solder, the full face of contact, there was no soldering surface.

(Appeal Transcript, pp. 144-145)